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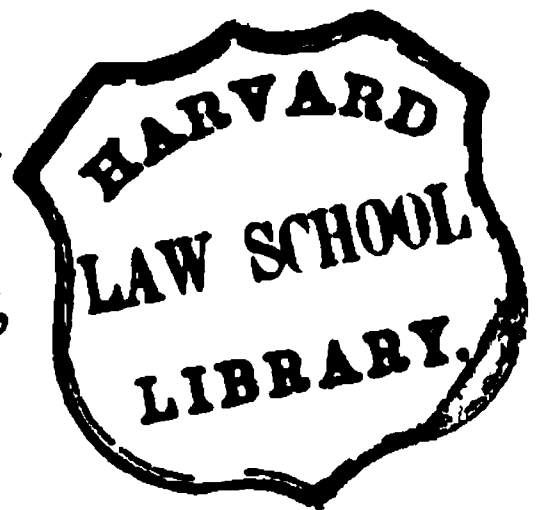
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Jul. 26

REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
SUPERIOR COURT
OF THE
CITY OF NEW YORK.

BY
JOHN DUER, LL. D.,
CHIEF-JUSTICE OF THE COURT.



VOLUME VI.

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Rec. Oct. 29. 1858

J U S T I C E S
OF THE
NEW YORK SUPERIOR COURT,
DURING THE TIME OF THESE REPORTS.

THOMAS J. OAKLEY, CH. J.,*

JOHN DUER,†

JOSEPH S. BOSWORTH,

MURRAY HOFFMAN,

JOHN SLOSSON,

LEWIS B. WOODRUFF,

EDWARDS PIERREPONT.‡

} JUSTICES.

* Chief-Justice Oakley died May 11th, 1857. His term of office expired the 31st of December, 1857.

† Judge Duer was appointed Chief-Justice the 16th of May, 1857. He died on the 8th of August, 1858. His term of office expires on the 31st of December, 1859.

‡ Judge Pierrepont was elected in November, 1857, for the full term of six years, commencing January 7th, 1858.

P R E F A C E.

JOHN DUER, CHIEF-JUSTICE of this Court, and also its REPORTER, died before this volume was completed. At the time of his death, all the cases, except the Practice Cases, had been selected by him, and had been prepared in the form in which they are reported. He had corrected the proof of the first impressions to the 364th and the plate proof to the 118th page. The Practice Cases were prepared by the undersigned. The latter also prepared the Calendar Cases in which he wrote the opinion of the court, (including *Forrest v. Forrest*, *Page v. The New York Central R. R. Co.*, and *Brown v. Davis*,) in the form in which they are published. This has been done under an arrangement between the deceased and the undersigned, which embraced as well the third, fourth, and fifth volumes of Duer's Reports as the sixth.

In consequence of this arrangement, it seemed to the undersigned that the sad event, to which reference has been made, not only rendered it proper that he should attempt to complete this volume, but devolved upon him that duty. He has prepared the Index and revised the whole proof. Some unimportant errors, no doubt, still exist. The authorities cited in the POINTS and in the OPINIONS could not be printed so as to avoid all errors without comparing them with the reports referred to. This comparison has been made to some extent, but not to such extent as to render

occasional errors of this kind improbable. It is believed, however, that, practically, they will be found unimportant.

The proceedings of the meeting of the members of the bar, held on the occasion of the death of Chief-Justice Duer, will be found in this volume. His great abilities, his high professional attainments, his judicial eminence, and his sterling virtues, and the sincere and general regard which they won for him, render it appropriate, as it is believed all will agree, that this tribute to his memory should form part of the volume which he was preparing for publication, when his mortal labors were terminated by death.

J. S. BOSWORTH.

NEW YORK, *August 28th*, 1858.

IN MEMORIAM.

THE PROCEEDINGS

THE MEETING OF THE MEMBERS OF THE BAR, OF THE CITY OF
NEW YORK,

HELD ON THE 11th OF AUGUST, 1858,

TO EXPRESS THEIR SENSE OF THE LOSS WHICH THEY AND THE PUBLIC
HAD SUSTAINED BY THE DEATH OF

JOHN DUER,

CHIEF-JUSTICE OF THE SUPERIOR COURT OF THAT CITY,

WITH A BRIEF NOTICE OF HIS FUNERAL.

CHIEF-JUSTICE DUER died at the residence of his son on Staten Island on the morning of Sunday, the 8th of August, 1858. His death was announced in the various courts of the city on Monday morning, and the courts adjourned until Tuesday, except the SUPERIOR COURT, which adjourned until the following Thursday.

At a preliminary meeting organized on Monday by appointing the Hon. MURRAY HOFFMAN *chairman*, and the Hon. CHARLES P. DALY *secretary*, these resolutions were passed:

Resolved, That a meeting of members of the bar be convened at the GENERAL TERM room of the SUPERIOR COURT, on Wednesday, the 11th day of August, 1858, at 12 o'clock, M., to express their sense of the loss the bench, the bar, and the public have sustained by the death of Chief-Justice DUER. Also,

Resolved, That Messrs. GREENE C. BRONSON, BENJAMIN F. BUTLER,

DANIEL LORD, JAMES T. BRADY, and E. W. STOUGHTON be appointed a committee to make suitable arrangements for said meeting.

On Wednesday, the 11th of August, at 12 o'clock, the meeting was held in the room of the principal TRIAL TERM of the SUPERIOR COURT, which was crowded to its utmost capacity.

Ex-Chief-Justice BRONSON called the meeting to order, and moved that Judge BOSWORTH, the senior and presiding Justice of this court, take the chair, which was carried.

On motion of Mr. JAMES T. BRADY, Judges HOFFMAN, SLOSSON, WOODRUFF, and PIERREPONT of the SUPERIOR COURT, Judge BETTS of the UNITED STATES DISTRICT COURT, Judge CLERKE of the SUPREME COURT, and Judge DALY of the COMMON PLEAS, were appointed *vice-presidents*.

On motion of Mr. E. W. STOUGHTON, Messrs. BENJ. D. SILLIMAN and FRANCIS H. DYKERS were appointed secretaries.

Judge BOSWORTH then rose, and spoke as follows:—

MY BRETHREN OF THE BAR AND GENTLEMEN:—I feel entirely incompetent to say any thing on the present occasion. It is a sad one to all of us, and particularly so to myself and to others occupying the same relation to the distinguished man whose death we deplore. At the same time, I deem it not inappropriate to this occasion that I should state some things in respect to the deceased which attached me to him and made my affection for him, personally, as strong as the respect I cherished for his learning, his great ability, and unsullied integrity. I had no acquaintance with him prior to my election as a member of the court which, during some nine years, he has adorned with his learning, and all the duties of which he has performed with untiring industry and fidelity. It is in the light of this brief personal acquaintance that I shall speak of our deceased brother, trusting that others will present the more comprehensive and extended view which is required to delineate him as he was and as he lived, and to do justice to his worth and services. That acquaintance commenced in the fall of 1851.

Conscious of his great genius and of his superior learning, as well as of his larger experience, I apprehended, without knowing why, that he might be impatient on encountering views less mature than his own, and that he possessed a tenacity of impressions and opinion that might ren-

der consultations with those whom he could not but regard as his inferiors, sometimes unsatisfactory, if not unpleasant. But it gives me pleasure to say that I never met one who treated opinions adverse to his own with more courtesy, or discussed questions giving rise to a conflict of views with more kindness, or who strove more to prevent a final disagreement of opinions, when that result occurred, from becoming a cause of even the slightest temporary dissatisfaction than himself. Whether to the credit of the court itself, or not, still it is true, in fact, that the most kind personal relations have always existed between its members. So strong and unbroken has been this personal cordiality, that I do not think any one member of it has failed to desire the re-election of an incumbent whose term was about to expire, whatever might be his politics, and whoever might be his competitor. And I have no reason to doubt that this was just as true at the time of my first election, and rightly so, too, as at any election that has since been held.

He was at all times resolute and firm in his resistance to all outside efforts to displace a faithful subordinate officer of the court, and fill his place with another on mere political grounds. Although it has become a practice in making nominations for each party to select candidates holding the political principles they cherish, yet it was his view that Judges could not add to the dignity of their office, or to their claims to personal confidence and respect, by exercising any of their powers for the mere purpose of proscribing subalterns who were faithful and competent on account of their political opinions.

No man was more industrious, or labored longer or more faithfully than he. He was so constituted that he could not be inactive. He read much, and, probably, no Judge in the state read more promptly or with more care every elementary treatise and every volume of reports, from time to time, as they were issued from the press. Even after the casualty which fractured his right leg, early in January last, and for many long weeks confined him in a fixed posture to his bed, he was a constant reader. As soon as he could sit up in his bed, and before he could be taken from it, he commenced the preparation of the calendar cases for the sixth volume of his reports. When last disabled by super-added maladies they had been completed, and nearly half of the volume was printed.

No judicial opinions excel his own in clearness, in fulness of illustration, in beauty of style, in the vigor of their logic, or in the richness or variety of learning by which they are supported. However strong may have been the impressions he had formed on the argument of a cause, as the statement and argument of it presented it, if it so happened that these impressions had been formed in the absence from the mind of any

fact which should justly affect the result, no one more readily than himself gave it its just effect when presented to his mind or recalled to his attention, and yielded so much of previous convictions as the truth and the law of the case required. But when his conclusions were deliberately formed upon a consideration of all the facts and a careful examination of the law, they were, as all would expect, the conclusions of a man of strong mind and great learning would be, so fixed as not to be easily shaken.

He had another mental habit. I will not say it is peculiar, but it is not common, certainly not in the degree that characterized him. He rarely, if ever, attempted to write an opinion until his examination of a case, and of the authorities bearing upon it, had been fully made and completed. The mental process was pursued until no new thoughts were likely to occur from further reflection before he began to write. Writing was not to him an aid or assistant in the comparison of authorities, or in reaching the legal conclusion, which, together, they tended to establish. Hence, most of his opinions, even when delivered at length, were at the time unwritten. Hence, they were delivered with as much precision of language, and in a form nearly, if not quite, as perfect as he wrote. And when he came to write, it was rare that any page of the whole was disfigured with an alteration or interlineation. I think it would surprise all who do not already know this fact to inspect the manuscripts of his longest and most elaborate opinions. It is a rare occurrence that a word is obliterated, altered, or interlined.

From a regard to his convenience, our consultations were generally held at his house. As a necessary consequence, those of his brethren who have been associated with him for years have met him weekly during the whole time, at his own fireside, and know how cordial and affectionate were the relations between him and each member of his family, and the severity of the bereavement inflicted upon them by his death.

I have seen him in health and vigor, in cheerfulness and hope, and I also saw him in the feebleness of his exhausted powers, and though the last interview was a sad one, I cannot regret that it occurred. Hearing that he was feeble, but hearing nothing to excite alarm, I visited him at the residence of his son on Staten Island, on the 30th of July. This is the last time that I saw him. He had been sinking rapidly for several days, and had been deprived by paralysis of the power of speech. Though supported by a person on either side of him, on account of his great debility, yet when our eyes met, the placid and friendly smile that lighted his countenance, and the pressure of his hand, though gentle, as he vainly strove to speak, told me I was recognized and welcome, and that he would if he could, have said something, that it might have been

well for me to hear and to ponder. But his earthly career is closed. He was born at Albany, in 1782, in a house still standing. His mother was then with her father, who had an important command in the northern department of the army of the Revolution, and was residing in Albany.

In contemplating this sad bereavement, I cannot forget that in the six brief years I have been a member of the court of which he was the honored Chief-Justice at the time of his death, others of his brethren have also fallen. First, Lewis H. Sandford, in the prime of life, and with great capacities and qualifications, and a most able and efficient Judge, was suddenly removed from this field of labor by the great destroyer. Next, and after a brief interval of time, Elijah F. Paine was called to his last account. By his death the court was deprived of an upright and able Judge. He had suffered so much from previous ill health, that he was not able to accomplish as marked results as his abilities, with good health, would have enabled him to produce. Next, and but a little over a year since, Thomas J. Oakley, then the Chief-Justice of this court, also died—when he died, a truly great man ceased to live. He had been a Judge of this court from the time of its organization. He bore himself heroically through all the vicissitudes and disasters of life. His experience was worth more than many volumes of matter printed to instruct us and light up the pathway of judicial and professional investigation and duty. It was a pleasure to contemplate him, when listening to the presentation of a voluminous and complex case, and to witness the facility with which he would discard immaterial matters, and reach the actual and turning points of the controversy. He always read and examined his cases with care, and was ready to discuss them at as early a day as any of his brethren associated with him in hearing the argument. It was unnecessary for him to read to be certain of elementary law, or to apply it with extraordinary accuracy. In considering, with a view to their decision, questions which had been argued before a full bench, when they were questions of moment, and there was a conflict of views, it was at times exceedingly interesting to listen to the discussion of them between himself and his distinguished associate, who has so soon followed him to the grave. The argumentation of the one was as terse and pointed as that of the other was copious and powerful. Each could assign as good reasons for the positions he took, and defend them with as much ability as any living Judge of our day. Each of them was a great aid to the other, and the experience and learning which the two combined would give strength and character to any court. But they, and Sandford, and Paine, all of whom were members of the Superior Court on the 1st of January, 1852, will be seen or heard no more in the land of the living.

In recurring to this succession of sad events, and yielding to the emotions with which the most recent of them all oppresses us, it is gratifying to know that the last years of our distinguished brother were years of happiness to him and to his family, and of usefulness to the public as well as to the profession, and of signal service to the court of which he was a member. His intellect was clear, active, and vigorous to the last. He found pleasure in performing the duties of the office, to which he had been twice elected by the suffrages of the people, and to the gratification of the bar. I do not believe that partiality or prejudice, or that fear or favor, or the apprehension of any consequences personal to himself, ever exercised the slightest influence over his deliberations, or for one moment clouded his views or warped his judgment. He was truly a great man, an eminent jurist, an upright and fearless Judge. If the average of the profession can and will, in all periods of time, equal his ability and learning at the bar, and fairly approximate to his stern rectitude in morals and conduct, and if the average of our Judges on the bench will bring to it the industry, the wisdom and the fearlessness which illustrated his brief judicial career, the legal profession will suffer no decline, the bench will dispense justice and command undiminished confidence and respect, and no one need despair of the republic.

HON. BENJAMIN F. BUTLER then offered the following resolutions:—

Resolved, That in the death of the Hon. JOHN DUER, Chief-Justice of the Superior Court of the city of New York, the legal profession and the public at large are called to mourn the loss of a Judge whose genius and learning made him an ornament to the bench upon which, with so much dignity, he presided; and whose uprightness, love of truth, and manly independence justly entitle him to the esteem and reverence of our whole community.

Resolved, That while we thus express our sense of the high judicial abilities of our departed brother, and of the fidelity with which he discharged his duties on the bench, a just appreciation of his character and services prompts us to a special commemoration of the eloquence, learning, and brilliant talents which distinguished him as an advocate; the scrupulous care with which, when at the bar, he sought to guard and promote the dignity and usefulness of his profession; his efficient and honorable labors to improve the legislation and jurisprudence of our state, as one of the revisers of its Statute laws; his writings on an important branch of legal science, and other productions of his pen, particularly his beautiful tribute to the memory of the great commentator on American law;

his genial spirit and scholarly attainments; his philanthropy and patriotism; and, above all, the unaffected Christian graces which illustrated and adorned his character and life.

Resolved, That as a mark of respect for the deceased, and of our deep sense of the loss which the public and the profession have sustained, the members of the bar now present will attend his funeral in a body.

Resolved, That a copy of the foregoing resolutions, attested by the secretaries of this meeting, be transmitted by them to the family of Judge DUEK, as an expression of our sympathy and condolence.

Resolved, That these proceedings be published under the direction of the secretaries, and that an attested copy be furnished by them to his honor, Justice Bosworth, to be by him laid before the Superior Court, at its next General Term, with the request of this meeting that the same be recorded in the minutes of the court.

Mr. BUTLER, in a voice of deep emotion, then spoke as follows:—

In speaking, Mr. President, to the resolutions which have been read, I shall endeavor to keep within the limits proper to the occasion. To do this I must omit any attempt to sketch the biography of Judge DUEK, and must confine myself to some personal reminiscences connected with his career and labors as a lawyer, and to such incidental remarks as they may suggest.

My earliest recollections of the friend and brother whose loss we now deplore, carry me back something more than forty years. He was then a member of the Orange county bar, less than five and thirty years of age, but already distinguished, not only at home, but in the highest courts, by his extensive learning, his logical powers, and his fervid eloquence. I was then a law student at Albany, where he frequently appeared as an advocate, and where I had thus an opportunity of witnessing his professional efforts.

I heard him in 1816, in *Jackson v. De Lancey*, one of the first causes argued by him in the court for the correction of errors. The case was important, and of special interest to him, for his clients were his own family, seeking to recover a large and valuable tract of land, once the property of his maternal grandfather, William Alexander, the Lord Sterling of the revolutionary army. Though unsuccessful in the claim, his argument confirmed and increased his previous reputation. I may

remark in passing, that his associate was John V. Henry, of Albany; the opposing counsel were Thomas J. Oakley, then of Poughkeepsie, and Martin Van Buren, then attorney-general of the state. What a bar did our state then possess, which, without drawing from this metropolis, could furnish, in the interior, four such men!

In 1821, he was a member of the convention which formed the constitution of that year. In this body, also, he was distinguished by his ability and eloquence.

In 1824, I was associated with him as his junior, in a case of interest, at the Columbia circuit, then held by his honor Judge BETTS; and then began my personal intimacy with him. In November of that year, most unexpectedly to each of us, we were appointed, with Erastus Root, then lieutenant-governor, to revise the statute laws of the state. A plan for a new and more scientific revision of the statutes, first suggested by Mr. DUER, was in the succeeding winter submitted to the legislature, and a new act passed for executing the work in accordance therewith, and committing it to Mr. DUER, the late HENRY WHEATON, and myself.

The late JOHN C. SPENCER afterwards came into the commission, in the place of Mr. WHEATON, and gave to it the great aid of his accurate learning and unparalleled industry. This is not the time or the place to enter into details concerning this work, or to speak at large of its influence on the legislation or jurisprudence of the state. But it is the time and place to say—and he who addresses you is, by a sad necessity, the only person who can now say it—that for any benefits derived from this work the people of this state are more largely indebted to JOHN DUER than to any other person. Others prepared larger portions of the text, and performed more of the severe labor which belonged to the work; but he was the head, the soul, the master-spirit, of the commission. And though, after having spent the greater part of two successive years at Albany in this service, he was compelled, by the duties of the office of United States Attorney for the Southern District of New York, (to which, in 1827, he was appointed by President ADAMS,) and by other imperative considerations, to withdraw himself, for the most part, from any further connection with the work, yet he continued to his associates his wise counsels, and occasionally his efficient and valuable aid. During the next twenty years, indeed until his accession to the bench, the intercourse between Judge DUER and myself, in successive re-publications of the statutes, and in professional avocations, was frequent, sometimes long protracted, and always of the most friendly character.

In the resolutions which have been offered, it was the design of the

committee—it was my design, for to me was intrusted the task of drawing them—to speak of our lamented friend and brother, not in the language of extraordinary eulogy, but in that of sober and discriminating truth.

In the same spirit, allow me to amplify a little some of the points touched in the resolutions.

Mr. DUKER's early judicial studies, like those of most of our American lawyers, were desultory and imperfect; indeed, during his clerkship, I have reason to believe, that he applied himself to the Latin classics and to general studies, rather than to the science of the law. But from the time of his admission to the bar, he must have studied, with great diligence, the law of real property, and other leading titles; and after he became a resident of this city, he devoted himself, with characteristic ardor, to the law of insurance and other branches of commercial law. One of the products of these studies—alas, that we are obliged to speak of it as unfinished—is found in the libraries of Europe as well as of our own country, in the two volumes of his *Law and Practice of Marine Insurance*. The just and beautiful tribute paid by you, sir, to our departed friend, makes it not only needless, but scarcely proper, that I should say a word as to his qualifications or services as a Judge; and I shall leave to those who are to follow me to speak at large of his abilities as an advocate and his genius as an orator. I will only say, that to great quickness and fertility of intellect, he united a vast amount of acquired knowledge, not merely in the learning of his profession, but in kindred sciences and in general literature. His taste had been formed by a diligent study of the Roman classics, and by the perusal of the best authors in our tongue, from Hooker and Bacon to his own time. He was passionately fond of poetry: in early life he sometimes courted the muses; and in his more elaborate speeches at the bar, in his occasional addresses which have appeared in print, and in many of his judicial opinions, he often exhibits an inspiration and a harmony, the natural fruit of these tastes and studies. A man of true genius himself, he had a true and sympathetic appreciation of the genius and merits of others, and was singularly free from any traits of envy, jealousy, and selfishness. Those who have heard him speak of the great men, who, forty years ago, adorned this bar, will at once recognize this feature of his character; and those who never enjoyed this pleasure, have but to read on the monument of Thomas Addis Emmett, his glowing eulogy of that illustrious orator, expressed in the tongue of Cicero, and breathing his very spirit, to convince them of the truth of my assertion.

In view of the solemn circumstances under which we are now assem-

bled, I cannot forbear saying, that it was my privilege to know, and it is now my happiness to remember him, as a Christian brother. To a strong and enlightened faith in divine revelation—a faith which not only withstood infidelity in the outer world, but had triumphed over the more dangerous enemy within—he added a personal acquaintance with its teachings, and a felt experience of their power, which enabled him to encourage and confirm the faith of others, while at the same time he exhibited a tenderness of feeling and docility, and humbleness of mind, which plainly showed that he understood the conditions, and cheerfully submitted to them, by which every soul, however richly endowed, must enter into the kingdom of God. His enlarged and catholic spirit, while he held to his own convictions and preferences, extended to all the same freedom of conscience which he claimed for himself, and embraced in Christian love the whole family of believers. The removal of such a man from the bench and the profession, even at his advanced age, is a great public loss. This we all feel; but we feel more acutely the sundering of those personal ties by which he was bound to us. The grief is great, nor is it rendered the less, but rather the greater, that it is divided among so many. The Judges who shared with him the duties and communion of the bench; those who yet survive, of his early associates at the bar; the associates, who, from time to time, appeared before him within these walls; the junior members of our profession, to whom he was only known by his writings and decisions—each and all these, know and feel that a brilliant light has been quenched; that a great jurist and good man has been forever withdrawn from us. If each and all these mourn for a professional brother, or a personal friend, I, more than any, or all of them, may well give way to these feelings; for, out of the immediate circle of his family, or close connections, I suppose there is no one to whom he has been longer or more intimately known; and to know him intimately was to admire, to esteem, and to love him. In the labors and studies with Mr. DUEK, to which I have referred, have been spent many of my happiest and most instructive days. For, while we investigated, with a single eye to the good of our fellow-citizens and the glory of our profession, the whole body of our written law, and labored, through days and nights of toil, to give fit expression to those parts of it upon which we were employed, we lightened those toils by frequent excursions into other, and sometimes widely different walks. Considerably my senior in years, and far—very far—my superior in gifts and knowledge, he was in the law, and in every other department, emphatically “my guide, philosopher, and friend.” Not to speak of his lucid explanations of the grounds and reason of the law, and the information he was so well qualified to give on legal ques-

tions continually coming into discussion in our daily tasks, he delighted to converse, not only on the more general topics of philosophy, politics, and letters, but on the momentous questions which grow out of man's immortal nature, and the relations in which he stands to his Creator, Governor, and Judge. How great were his conversational powers! With what facility and richness he poured forth from the stores of his well-furnished mind, and by the aid of his wonderful memory, wise and worthy thoughts and suggestions, on subjects which awakened those powers, must be well known to many of those now present; indeed, to all who have had the opportunity of familiar acquaintance with him. And now what shall I say more? When I think of the loss which you—brethren of the bench and of the bar—have all sustained—of the special loss which has fallen upon me—and of the far heavier loss which has fallen with crushing weight upon his afflicted family—I could almost cry out with one of old,—

*"Quis desiderio sit pudor aut modus,
Tam cari capitis."*

But, blessed be God, this sad question of the Roman poet, and the wail of hopeless sorrow with which he replies to it,—these are not the utterings in which we are either required or permitted to indulge. Death has, indeed, removed from our mortal sight the upright Judge,—the eloquent orator,—the loving friend, father, husband,—and therefore we must needs sorrow, and deeply sorrow; but the Saviour in whom he believed, "hath abolished death, and hath brought life and immortality to light, through the Gospel." The precious trust, which, on the last Lord's Day morning, at the hallowed hour of prayer, was then committed to Him by the friend and brother, to whose virtues we dedicate these imperfect but sincere expressions of affection and regret,—this precious trust that Saviour is able to keep, and will assuredly keep, "against that day." With these thoughts and hopes, let us comfort one another; and in them let us seek that preparation which each of us, in his turn, will soon need for his own departure.

Mr. HIRAM KETCHUM seconded the resolutions, and spoke as follows:—

Mr. President,—In seconding the resolutions just read, I will take the liberty of submitting a few remarks.

It is sad, very sad, to think that our venerable friend and learned brother, has been compelled to leave for ever these places and scenes in which he greatly delighted. Yet we, his survivors, find some consolation for our bereavement in remembering that our friend was permitted

to pass the boundary of time usually allotted to human life ; that, at his decease, he filled an elevated and useful position, to which he had been twice elected by the choice, fairly expressed, of his fellow citizens ; that although we, who daily saw him, could not fail to notice that his bodily strength had begun to fail, that his step was less firm and elastic than of yore, yet his mind was wholly unimpaired, the vast treasures of his memory were yet subject to his command, his intellectual faculties were full of vigor, and his heart yet glowed with professional zeal. He died full of years and full of honors ! There is no cause, on account of the departed, for deep, much less agonizing sorrow. There is another fact, connected with his last illness and death, personal to himself, which it is pleasant for friends to remember. Judge DUEK was not, like some members of our profession whose death we have heretofore had occasion to deplore, suddenly called away. He was not compelled, in an instant of time, to take the last review of a whole life, but he was gently admonished, he received timely notice to quit, and it cannot be doubted that he availed himself of this notice to collect his powers for this great event, and to prepare to die with calmness and dignity, and with the true Christian's glorious hope of the future.

Mr. President, the only profitable use which we can make of this and all similar occasions, is to exhibit such traits and characteristics of the departed as are worthy of commendation, and hold them up to the admiration of the survivors. There were many characteristics of our departed friend worthy of imitation, especially by the young members of the profession.

JOHN DUEK was born in the city of Albany, the capitol of the state. He was born in the year 1782, memorable for giving birth to a number of very distinguished Americans. Daniel Webster, John C. Calhoun, Martin Van Buren, and Thomas J. Oakley, I believe, as well as JOHN DUEK, were born in 1782, of whom M. Van Buren alone survives, in a green old age.

Mr. DUEK was a self-made man. It is common to meet with persons in society who rejoice in proclaiming themselves self-made men. These persons not unfrequently possess many excellences, but modesty is not usually numbered among these excellences. Being self-made men, they must necessarily be a little better made than their neighbors. Mr. DUEK did not boast of being self-made, nor, out of his family circle, was the fact ever spoken of ; I have learned it from his family since his decease. His early education was very imperfect, and he joined the army of the United States at the age of sixteen years. He served two years, and then entered the office of General Hamilton, as a law student. He found himself, at the age of eighteen, so deficient in

knowledge, as to be utterly unprepared to enter upon a course of legal studies. He then devoted himself to preliminary studies, being confined to them, not unfrequently, eighteen hours a day. He made himself a thorough scholar; he acquired a knowledge of the ancient classics, and of the Italian and French languages. He could, as I am informed, read the Latin, Italian, and French languages without the consciousness that he was perusing a foreign tongue. From these studies he became a master of his own language; very few men could write or speak the English tongue with more rapidity and fluency, with more accuracy and elegance, than Mr. DUEK. Those who knew him best will say that he was unsurpassed in these accomplishments.

He then devoted himself, with all the ardor of his ardent nature, to the study of the law, with a determination to excel in his profession. How well he succeeded we have already been told. He was no mere case lawyer, yet few in his profession had studied all the leading cases more diligently, or could refer to them with more readiness, than himself. He had thoroughly studied the principles of law in the writings and productions of the great masters of jurisprudence.

After what has been said by the learned gentlemen who have preceded me, it is quite unnecessary that I should further dwell upon the learning and intellectual accomplishments of our departed friend; but he possessed one other characteristic, which has been adverted to by the president. He was a man of courage—of moral courage. No man is fit to be a Judge, however learned, amiable, and industrious, and, I may add, however honest he may be, who is not a man of courage. There were two memorable instances, in my recollection, in which he exhibited this quality.

In the year 1843 he was a member of the diocesan convention of his own Church. In the annual communication made by the bishop to that convention, he made a statement, and declared an opinion, which Mr. DUEK believed to be erroneous, and which he thought were calculated to do injury and work injustice. Whether or not he was right in this connection it is not necessary that I express an opinion, but that he was fully convinced in his own mind that he was right, I have not a particle of doubt. Actuated by this conviction, it was impossible for him to remain silent, and the only way that he could express his dissent, was by offering a protest. He did offer it, although he knew he was opposed by a large majority of the body in which it was offered. The protest, and the manner in which it was met by the bishop, caused great excitement at the time. I have adverted to the occurrence to illustrate the moral courage of Mr. DUEK.

Again, in 1851, there came to this country an illustrious stranger

from Europe, who had enacted a conspicuous part in the struggle of Hungary for liberty. The fame of his patriotism, his sacrifices, his extraordinary zeal and eloquence, had preceded him, and prepared the people of the United States to receive him with open arms and sympathizing hearts. When he arrived and had been received by the shouts of the multitude, he saw fit to suggest and argue that the principles of non-interference in the controversies of foreign nations, recommended by Washington in his farewell address to his countrymen, were erroneous, and he invited our government to violate those principles in behalf of his own oppressed Hungary. By many of our most distinguished countrymen, public men and others, the stranger Kossuth was allowed to proceed in this course without opposition. Being a distinguished member of the bar in his own country, he was invited to a complimentary entertainment by the bar of this city. He accepted the invitation, and on the occasion of meeting the bar, he availed himself of the opportunity to advocate the opinions to which I have adverted. A toast was given to the judiciary, and Judge Duer was called on to reply to it. In making this reply, and in a manner most respectful and deferential to the guest of the occasion, he maintained the American doctrine promulgated by the father of his country. This protest was again received amid a storm of excitement. No matter, the protest had been made, it could not be withdrawn; it had been made by a man with a heart full of American feeling; a man who had served under Washington and Hamilton; it had been made by a member of an independent judiciary; it must stand. It did stand—it does stand. When the bar had time to grow cool and reflect, the action of Judge Duer was heartily approved by that body, and the great community sympathized with him.

The conclusion to which, from these instances and what we know of Judge Duer, we are inevitably drawn is this, that when he heard the wrong asserted upon a matter of importance, he could not by his silence acquiesce, or seem to acquiesce; there was that within him which compelled him to speak out without calculating the consequences to himself. **HE MUST SPEAK.** For this instinctive courage I honor his memory.

I hope, sir, I am able adequately to appreciate the learning and industry of our departed friend, and admire his eloquence, but above and beyond these, I honor his moral courage. As a tribute to this high quality, and speaking for myself only, and not assuming to represent any other man, or set of men, I crave permission to weave with my own hands a garland to hang upon his tomb.

I second the resolutions.

Mr. JAMES T. BRADY arose and said:

Mr. President,—The regret I feel at taking any part in these solemn proceedings, equally arises from my sorrow at the event which has so recently transpired, and my reluctance to undertake, even in the briefest space, to speak in the presence of my learned and eloquent brethren of that illustrious man who, in my humble judgment, beyond all the members of this bar, was most capable of pronouncing a funeral oration, if the greatest of the earth had fallen. It was, however, deemed appropriate by the committee that something should be said as a tribute to the deceased, by a gentleman belonging to that period of our profession which is a little in the rear of that which furnished the speakers who have preceded me. I hoped to have had the pleasure, and I am sure it would have given the greatest satisfaction to the bar, to hear our brother Stoughton, to whom it was deemed most judicious that this task should be assigned. His eminent qualifications, his high professional position, the active duties performed by him in the Superior Court, and the general capacity which he possesses to interest his hearers, rendered him a fit orator for this time.

But a few minutes remain ere we must leave this chamber, which seems full of the presence of JOHN DUEK, radiant yet with his great learning and his benign countenance; but a few moments must elapse ere we leave this chamber to stand, in so much of sorrow as becomes the time, over his honored grave; and I hope no one will be offended if, of these few moments, I appropriate a share in bearing to his memory a tribute, not of learning, not of oratory, but of affection. I hope no one will sorrow if to my humble capacity has been assigned the duty, pleasurable in some degree, but painful beyond its pleasure, of speaking in such terms as I think he deserves, of one whom all my contemporaries at the bar ought to be proud to have loved and to remember by the dear name of father. Only a few moons have waned, Mr. President, since we were called to grieve over the mortal remains of him whom all of us delighted to call the "Chief"—whom some of us, with a playfulness that even his grave character would not reject, called the "old Chief." It was, sir, a proud title at this bar, and yet how richly deserved. Chief he was, Chief he deserved to be, and Chief he would be in any theatre, at any forum, where the mightiest intellects contended for honorable triumph. But he is gone, gone after a long and useful life, and we may no longer justly repine that he is laid in his "narrow place of rest."

"After life's fitful fever, he sleeps well."

That bereavement, Mr. President and gentlemen, had with it an attending consolation. For the Chief who departed, a worthy successor remained. A place that could not long continue vacant, without direct injury to the community, received the services and the lustre of him, the rays of whose bright intelligence are no longer to visit us except in the "gladsome lights of jurisprudence," reflected from the great memorials of his genius, his industry, and his merit. And I hope, turning from you, learned Judges, to my brethren of the bar, that it may not be considered out of taste or inappropriate, as I know it is not undeserved, for me to say, that even in this new calamity, there is promise of an alleviation that gives us the brightest hopes.

Mr. President, and brethren of the bar, death has so frequently fallen upon our ranks of late, that it has become more familiar than life itself; and yet there is no one who reflects, that can fail to appreciate the appalling character of that circumstance which removes from earth the good, the learned, the useful, the wise. All of us recollect the familiar language of the Latin writer, always trite in the reference, but ever fresh in its lesson :—

"Pallida mors aequo pulsat pede pauperum tabernas Regumque turres."

There is, Mr. President, a sublime dignity in death, from which we might not be so eager to shrink, if we gave to the soul and its noble aspirations that mastery over the meaner instincts of our nature, or the common instincts of our nature, which sway too largely the destiny of man. And that dignity never appears more graceful than when it descends upon the grave of him who, after a long and useful life, with the staff of unwavering hope in his hand, goes out into the future, and, having himself been a judge on earth, stands in the presence of that other Judge who will rectify all the errors which vice, mistake, or ignorance, may have introduced into mortal tribunals. And thus we see the deceased go from us. Thus we behold him—truthful, confident, courageous, venturing out into that unknown world where we are at liberty to hope that such merit as his will find the reward to which it seems so eminently entitled. Speaking in humble and inadequate phrase for those cotemporaries of mine by whom I see myself surrounded, I ask the privilege of recalling the pleasant days when, in the grand and spacious old room of the Superior Court, we were wont to meet together in those delightful associations which the meanness of a vulgar government has made no longer possible in the city of New York. I refer with pride and gratification, to the chambers in which we made the acquaintance of Thomas J. Oakley—of that other stalwart, noble old chief, the Eldon of his time—of Hoffman, Tallmadge, Sandford, Van-

derpool, Einmett, and last, not least, of him whose loss we are called here to mourn. Ah, how many of those Judges have been called away! And ah, how upon the ranks of the profession dreadful demands have been made! The sea as well as the earth has swallowed up our lost companions; and the little band which clustered there, full of the sense of duty, striving for rank and position more than for wealth, how has it been thinned by the touch of the great destroyer! There are others, however, remaining. As to some of them, we see their heads, whitened with the snows of age, moving forward with the deserved pre-eminence they have secured by years of diligent toil. Behind them a rank in which, perhaps, as to years, it is proper I should place myself; and pushing forward with an energy that will entitle them to the high positions they are destined to gain, a young band of companions who, being here to-day, may profit by the teachings of the occasion, and the eloquence that has fallen from gifted lips. Why, Mr. President, there is nothing on earth that is so beneficial to the lawyer as, while engaged in the arduous labors of his profession, to study with unwavering constancy the peculiarities of the Judges before whom he is destined to practice. I have always endeavored to discover in what the merit of the Judge actually consisted, and I have reached one result which, I have no doubt, will prove to be the common experience of my brethren, that respect for a Judge is always inseparable from affection. I know it is the province and the practice, and I claim it is the duty of the bar, freely to criticise the action of the judiciary.

Slavish and useless would that bar be which ever hesitated to exercise this high power; and I am well aware that some of my brethren have, more than once in my hearing, suggested of the venerable deceased that there was in his judicial manner impatience and wilfulness, and that he was opinionated. There never was a greater mistake, as we are admonished to-day by the testimony of our presiding officer. I never could suppose that the amiable and accomplished gentleman would sustain that character less on than off the bench. It was, indeed, the habit of his mind to seize rapidly on any subject presented for his contemplation. He was a man of genius in the loftiest sense that can be attributed to that mysterious and inexplicable word. He was a man of genius, and the spirit of the advocate which had been lighted up by that genius in his early professional career never quitted him, even on the bench, and it would be flattery to say that this was not one of his characteristics. But he was the high advocate of right, of law, of justice. It is true, that when a case was brought before the bench to be discussed, and there was advanced even one thought that seemed to be the precursor of error coming to cloud or confuse the judicial mind, he never

hesitated to expose and dispel it. It is true that he stood as with a flaming sword, and guarded every entrance by which such error might approach. It is true that his mind caught from the discussion, which elicited sparks of flashing intelligence from the members of the bar, many a ray of parti-colored light. In that respect the gem set within his soul suggested a close comparison to another jewel highly prized among men. It could give back all the tints cast upon it; but it remained still the diamond—brilliant in its pure integrity with its singleness of color and its capacity to diffuse more light than it received. He is gone. To all that was perishable of him, a tearful and eternal adieu. But he has constructed his own monument in the results of his great and enlightened labor, and they stand present to our intellectual vision, covered all over with the lustre of his personal character. Mr. President and brethren, I would feel that I was doing injustice to you, to the subject, and to myself, if I took my seat without expressing one other idea not yet advanced, which forces itself upon me, as I hope it will commend itself to you. We cannot afford, in times like these, to lose from the bench minds like that of JOHN DUER. If one can credit the press, if we can believe the general expression of the community at large, if we can trust the result of our own observation, this state and this country of ours are hastening to a condition, if, indeed, they have not already reached it, which leaves nothing to depend upon for the preservation of life, of character, of property, of any thing that we prize upon earth, but an honest, learned, and fearless judiciary. Existing systems which injure not so much in the mode of selecting Judges as in the administration of their duties when elected, are censured by a large majority of this bar, and I may safely claim, there is little promise, that when a man like Judge DUER is taken away, the successor chosen in popular favor to supply his place will approach him in merit. And you, my brethren of the bar, in view of this sad event which calls us here, ought now to take a fresh resolution into your hearts, and cling to it with undying tenacity, so to labor in this period and in the future, as to guard against the fell influence of that demon worse than death, who strikes down the Judge, not in the period of his physical decay, nor when he is no longer able to increase the prosperity of his fellow-citizens, but assails and destroys him in the midst of his life and usefulness. Let us pledge ourselves, one to the other, that nothing which intellect, association, or industry can accomplish, shall be left untried, so to regulate the future affairs of this state, at least, that when a light is withdrawn from the bench like that just extinguished, the judiciary, the bar, and the community will not be left in darkness or in danger.

The resolutions were then put and carried without dissent, after which Judge Bronson moved that the meeting adjourn to attend the funeral. The motion was carried, and the meeting then adjourned.

THE FUNERAL.

THE members of the bar having adjourned at a quarter before two o'clock, immediately proceeded to Trinity Church, where a large crowd of persons had already assembled. The officiating clergy, pall-bearers, etc., having assembled in the vestry-room, proceeded shortly after two o'clock to the main porch to meet the body, when the mournful procession moved up the aisle in the following order, the organ playing a solemn dirge, while the beautiful opening sentences of the burial services were read by the Rev. Dr. Ogilby:—

The Sexton, with Staff shrouded in crape.

Rev. Dr. Ogilby,

Rev. Mr. Montgomery.

Pall-Bearers.

Hon. John Slosson,
Hon. Charles P. Daly,
Hon. J. S. Bosworth,
Hon. Washington Irving,

Body.

Pall-Bearers.

Hon. Gulian C. Verplanck,
Hon. B. F. Butler,
Hon. Murray Hoffman,
Hon. Ogden Edwards.

Chief Mourners, two and two.

Attending Physicians.

Dr. Anderson,
Dr. Bogart,

Dr. Cammon,
Dr. Hoffman.

Citizens, two and two.

The choir then sang the anthem, "Lord, let me know my end, and the number of my days," after which the Rev. Mr. Montgomery read the lesson, 1 Cor. xv. 20.

The Rev. Dr. Ogilby then gave out the 129th hymn, which was sung by the choir:—

"Rock of ages, cleft for me,
Let me hide myself in Thee."

The Rev. Dr. Ogilby then said that portion of the burial service commencing—

“Man that is born of a woman hath but a short time to live.”

After which Rev. Mr. Montgomery read that portion committing the body to the ground, the sexton casting the earth on the coffin. The choir then sang the anthem from Rev. xiv. 13.

“I heard a voice from Heaven saying unto me, Write, from henceforth blessed are the dead who die in the Lord: even so saith the Spirit, for they rest from their labors.”

The concluding prayers were then said by the Rev. Mr. Montgomery, when the procession moved to the family vault, in the same order in which it had entered, the organ playing the Dead March in Saul. Arrived at the vault, the coffin was lowered, and the vault covered up.

The crowd then slowly dispersed. The coffin was of plain mahogany, with silver handles and studs, and bore this simple inscription:—

JOHN DUER,

Born, October 7, 1782;

Died, Aug. 8, 1858.

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C A S E S
ARGUED AND DETERMINED
IN
T H E S U P E R I O R C O U R T
OF THE
C I T Y O F N E W Y O R K .

**WILLIAM JELLINGHAUS v. THE NEW YORK INSURANCE
COMPANY.**

A marine policy contained the following clause: "In case of a partial loss by sea, or damage to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of a portion only of the contents of the packages so damaged, and not otherwise." Upon a loss occurring, the agent of the company instructed an auctioneer to sell the goods, which was not objected to by the assured. That agent was empowered to act in the separation, and in giving such consent to employ an auctioneer. Upon the failure of the latter,

Held, that the loss, by reason of the failure of a mutual agent, should not fall on the company.

Held, that the inquiry was, purely, whether the company had assumed possession and control of the goods.

Held, also, that the agent, aforesaid, was not authorized, by reason of his authority to concur in measures for the separation, to take such control.

Held, that express authority, or continued recognized acts of the same nature, were necessary.

(Before **HOFFMAN**, **SLOSSON** and **WOODRUFF**, J.J.)

Heard, April; decided, June, 1856.

MOTION by plaintiff for judgment upon a verdict, a case being made, with liberty to turn the same into a bill of exceptions.

Jellinghaus v. N. Y. Ins. Co.

The following facts were admitted:

That on the 20th of October, 1847, an open policy of insurance for \$100,000 was made by the defendants with Spies, Christ & Co., of the city of New York, merchants, on account of whom it might concern, on merchandise on board vessel or vessels, from Hamburg, Antwerp, Bremen, or Havre.

That in or about July, 1848, forty-six cases of hardware, covered by said policy, and belonging to the plaintiff, were shipped from Bremen to New York, on board the ship Charlotte Reed.

That the said forty-six cases of hardware, on the arrival of the said ship, were delivered to the plaintiff's agent in New York, and that thirty-five of the said cases were damaged by sea-water.

That Spies, Christ & Co., assigned to the plaintiff their right to claim under the policy for such damage.

That the amount of damage on eight of the said thirty-five cases was agreed upon between the plaintiff's agent and the defendants, at the sum of \$88.84.

That the invoice value of the remaining twenty-seven cases, was \$2442.67, and that they were insured to that amount under the policy.

That the net market value of the said twenty-seven cases, if the same had not been damaged, was \$4969.16.

That the said twenty-seven cases were sold at auction, in the city of New York, on the 21st of September, 1848, and that the proceeds of such sale amounted to \$2357.14.

That the auctioneer's charges and commissions for selling the said twenty-seven cases, amounted to \$117.86.

That the expense of cleaning the hardware in the twenty-seven cases, and putting the same in good order for the sale at auction, was \$8.98, and that the auctioneer failed to pay over the proceeds of the sale to either party.

The plaintiff claimed that the defendants were liable to him for the proceeds of the sale at auction.

The policy contained the following provision: "In case of partial loss by sea, damage to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of a portion only of the contents of the packages so damaged, and not otherwise."

Mr. Satterthwaite was the secretary of the company, and the evi-

dence was sufficient to show, that he acted as authorized agent of the company in making the separation so provided for. The greater part of the testimony was directed to the establishing of the fact that he did act, and made declarations equivalent to the taking the entire control of the goods, and assumed the ownership of them.

The plaintiff having rested, the defendants' counsel moved that the complaint be dismissed, or for a nonsuit, which motion the court denied, and the counsel for the defendants excepted.

The evidence being closed, his honor the Chief-Justice, who tried the cause, charged the jury as follows:

That the sale in this case was made in compliance with the special provision in the policy, that in case of partial loss by sea or damage to hardware, the loss should be ascertained by a separation and sale of the portion damaged.

That both parties were interested in the sale; plaintiff, as owner of the goods, and defendants, to reduce the amount to be paid by them under the policy.

That from the nature and object of the sale, the auctioneer was necessarily the agent of both parties, and neither party guaranteed his fidelity or solvency to the other.

That the auctioneer's commissions and other charges incurred for the sale were paid by the defendants, because in all such cases the expenses of the sale were, by law, to be borne by the underwriters.

That there was no abandonment of the goods to the defendants, and there could have been none in this case.

That any acts of Mr. Satterthwaite, as vice-president of the company, accepting the ownership of the goods, were binding on the company.

That the only question for the jury was, whether the defendants had become the owners of the goods, and were such owners, at the time of the sale. If they were such owners, the jury should find for the plaintiffs; if not, for the defendants.

The counsel for the defendants excepted to that part of the Judge's charge which stated that any acts of Mr. Satterthwaite, as vice-president of the company, accepting the ownership of the goods, were binding on the company.

The jury found a verdict for the plaintiff for \$1669.22.

B. D. Silliman, for plaintiff.

Robert Emmet, for defendants.

BY THE COURT. HOFFMAN, J.—The case arises in this form, 1st. upon one exception taken to the admission of evidence; 2d. upon a refusal to nonsuit the plaintiff; 3d. upon one exception taken to the charge of the Judge.

1st. The ruling of the Judge was excepted to, for allowing evidence that the company had agreed that the receipts given by Meynen, through his clerk, should be without prejudice to the claim upon the company for the proceeds of the sale at auction.

The defendants do not include this exception in their present points, and we apprehend the objection was not entitled to any weight.

2d. It is urged that the motion for a nonsuit ought to have been granted. This motion was made after the evidence, on both sides, had closed. When the case was heretofore before the General Term, the decision was, "that, irrespective of any agreement to the contrary, the appointment of an auctioneer, to sell the property in question, under the provisions of the policy, must be deemed, in law, to be the joint act of the parties; and, of course, the defendants would not be responsible for his failure. That the plaintiff, therefore, could not succeed in the action, without showing that the defendants took the goods as their own, and sold them as their own, and that the evidence fell far short of making out that case." A new trial was thereupon granted.

This, then, was the precise question submitted on the present trial, and by the Judge who delivered the opinion of the court upon the former occasion. It appears to us that the law of the case, so far, was then, and in that manner, settled. If the acts of Satterthwaite bound the company, there was evidence enough for the jury to find as they did; at least, their verdict was not so against evidence as to require that the case should be sent back to them.

The case does really, then, depend upon the determination of the next question, viz.: that as to the powers of the vice-president.

3d. The Chief-Justice charged, "that any acts of Mr. Satter-

thwaite, as vice-president of the company, accepting the ownership of the goods, were binding on the company." To this part of the charge an exception was taken. We have not, in this case, the charter before us, nor any thing which tends to define the powers given by it, or by any by-law, to the vice-president. Nor have we any proof of an exercise of power, so as to raise the presumption of its being conferred, or of any ratification, or adoption of acts of a similar nature.

We have the fact before us, that the vice-president acted in the matter (sometimes with the secretary) on behalf of the company; and it was not questioned, on the former trial, nor has it been questioned here, that the office and duty of effecting the separation and sale of the portion damaged partially, was properly within the scope of his power, so far as the company had any thing to do with it. And we may observe, that the law of the case seems to be, that as both parties were interested, the auctioneer was the agent of both parties in making the sale. But the question is very different, whether such a power involves the right of actually assuming the ownership of the goods, and binding the company to a responsibility for them, and for the default of an auctioneer.

In *Beatty v. The Marine Insurance Company*, (2 John. Rep. 109,) the charter was in proof, and it was shown that the act in question, (acceptance of an abandonment,) could only be done with the consent of at least four directors, with the president or two assistants, or a plurality of them. The assent of the president and assistants was held insufficient.

Norton v. The National Bank, (1 Hill, 572,) only recognized the general rule, that the acts of a director or other officer of a corporation, unless official or in respect to his agency, are no more operative as against the institution than the acts of any ordinary corporator, and these are no more so than the acts of a stranger.

Hodges v. The City of Buffalo, (2 Denio, 110,) also cited, was a case of the want of power of the corporation itself to do the act in question.

The Life and Fire Insurance Company v. The Mechanics' Fire Insurance Company, (7 Wendell, 81,) involved the proposition that a president of a company, by virtue of his office only, is not empowered to borrow money on its account; some authority to do so must be proven.

Spitzer v. St. Mark's Ins. Co.

In *Hanbury v. The Alleghany Mutual Insurance Company*, (4 Barry Penn. Rep. 187,) there was the following instrument: "This certifies that D. H. Eddy, of Warren County, Pa., is appointed an agent of the Alleghany County Mutual Insurance Company, and is authorized to receive applications for insurance, and the premium thereon, on which applications a policy will issue, or the money be immediately returned. L. WILMOUTH, president."

After the plaintiff had closed, the defendant proposed to prove that at the time the agent requested him to become a member, the defendant was assured that the company was not insuring in the city of Pittsburg or other large cities; and, that the defendant said, "If such is the case I will become insured, and a member of said company," and gave his deposit note accordingly.

This evidence was objected to, and overruled by the court, and defendant excepted. He then further offered to prove that, at the time the president appointed Mr. Eddy the agent of the company, he said they would not, or did not, insure in the city of Pittsburg; that the company was intended for the county, and not for the city of Pittsburg, and that the agent so represented to the defendant, at the time of giving the note in question, and becoming a member of the company, and it appearing by the evidence that the company did, at the time and afterwards, insure in the city of Pittsburg. This offer the court also rejected, and sealed a bill of exceptions. The court above was of opinion that the Judge was right in rejecting the evidence offered.

In our judgment the plaintiff has failed in establishing the fact that Satterthwaite had sufficient authority to bind the company by assuming the ownership of the goods in question.

There must be a new trial.

LOUIS SPITZER v. THE ST. MARK'S INSURANCE COMPANY.

Goods were insured in a store, No. 21 Avenue D, and during the running of the policy were removed to another store, known as No. 371 Grand-street. This removal took place on the 1st of February, and notice thereof was given to the company on the 1st of March.

By one of the clauses of the policy it was provided as follows: "This insurance, (the risk not being changed,) may be continued for such further time as shall

be agreed upon, provided the premium thereof is paid, and endorsed on this policy, or a receipt given for the same."

By the charter of the company it was provided, "that the president, or other person appointed by the board of directors for that purpose, shall be authorized in the name and in behalf of the company, to make contracts of insurance with any person or persons against loss or damage upon any property on which this company may lawfully make insurance. The policies issued pursuant to such contract of insurance shall be signed by the president, and countersigned by the secretary of the company; or the same may be signed and countersigned by such other person or persons as a majority of the directors may appoint for that purpose. Such policies shall be binding and obligatory upon the company in like manner and force as if made under the seal of the company."

A loss by fire occurred on the 1st of July, 1854.

Much testimony was taken as to the acts and declarations of officers of the company, tending to show acquiescence in the change of the risks, on which the jury were instructed to pass.

On exceptions to the charge of the Judge, *held*—

That, under the charter and general act, no insurance could be binding unless it was in writing, nor unless it was signed by the president and secretary, or other persons designated by the directors.

Held, that the effect of the removal of the goods was to put an end entirely to the policy. It did not cover the goods afterwards, but was as void and inoperative as if never made.

Held, therefore, that to revive the policy was the same as to make one, and could only be done by a written instrument, executed in the same manner as an original instrument must be.

(Before HOFFMAN, WOODRUFF and SLOSSON, JJ.)

Heard, April; decided, June, 1856.

MOTION for judgment upon a verdict in favor of the plaintiff, taken under direction of the court, upon a case to be made, to be heard in the first instance at General Term.

On the 26th of October, 1853, the defendants, an incorporated fire insurance company, executed a policy to the plaintiff's assignor, Julius Englemans, by which they insured him in the sum of \$800, "against all such loss and damage as should happen by fire, or in consequence thereof, to his merchandise or store fixtures, seven hundred and sixty dollars, of the said sum of \$800, to be on his said merchandise, and the remaining forty dollars on his store fixtures, contained in the store known as Number 21 Avenue D, in the city of New York, during the term of one year thereafter, viz.: from the 26th day of October, 1853, to the 26th day of October, 1854, the said loss to be estimated according to

the true and actual cash value of the property at the time the same (the loss) shall happen."

The only terms of the policy, or of the conditions annexed, which were noticed by counsel, or are deemed important upon the questions raised, are the following: "This insurance, (the risk not being changed,) may be continued for such further term as shall be agreed upon, provided the premium therefor is paid, and endorsed on this policy, or a receipt given for the same." And, by the first of the conditions, "if, during the insurance, the risk be increased, by the erection of buildings, or by the use or occupation of neighboring premises, or otherwise, or if for any other cause the company shall so elect, it shall be optional with the company to terminate the insurance, after notice given to the assured, or his representative, of their intention so to do; in which case the company will refund a rateable proportion of the premium."

On the 1st of February, 1854, all the goods, merchandise, and fixtures insured, were removed from the store No. 21 Avenue D, to a certain other store, known as No. 371 Grand-street. On or about the 1st of March, 1854, notice of this removal was given to the defendants, and the transactions between them, and the alleged parol declarations of their officers, hereafter stated, constituted, it is insisted, a binding agreement, to continue the policy in operation. On the 1st of July, 1854, a fire occurred at the store in Grand-street, by which the merchandise and fixtures were destroyed, and damaged beyond the amount insured.

By the charter of the company, (§ 10,) "the president, or other person appointed by the board of directors for that purpose, shall be authorized in the name and behalf of the company, to make contracts of insurance with any person or persons. The policies issued pursuant to such contracts of insurance shall be signed by the president, and countersigned by the secretary of the company, or the same may be signed and countersigned by such other person or persons as a majority of the directors may appoint and designate for that purpose; such policies shall be binding and obligatory upon the company, in like manner and force as if made under the seal of the company."

It is needless to state the testimony tending to prove an assent of the company to the continuance or transfer of the risk to the

goods in the new store to which they were removed. The question whether the verdict was warranted by the proof, if the directions of the Judge were right, is not before us. The questions arise upon his charge, and the refusal to charge as he was requested.

The first and very important point arises in this manner: the Judge was requested to charge that the company could not be bound for the insurance of the property after a change of location, unless by some acknowledgment in writing; and that the officers of the company could not bind it for a loss, after a change of risk by removal of the goods, except by the execution and delivery in writing of a consent to continue the risk after the change.

The court charged that the removal of the goods without the consent of the defendants avoided the policy, unless a subsequent assent to transfer the risk had been given. This assent might be verbal or written, and it might also be implied. Thus, if the company, by its silence when asked if they would assent to a transfer, leave the party under an impression that they will, retaining the policy beyond a reasonable time, an assent may be fairly inferred, more especially if any of their authorized agents should tell the party that the policy will be sent. The company, if they did not mean to assent, should promptly say so, when apprised of the application. The jury were to consider all the facts proved on either side, and decide whether an assent could be inferred.

The Judge then made some observations on the testimony, and proceeded thus: "If they were satisfied that the policy was left with the defendants in March, for the purpose alleged, and that a surveyor had been sent there; if they believed the evidence on the part of the plaintiff, it would amount to an acquiescence by the company in the change of the risk; on the other hand, if they believed that when the policy was left with them, nothing was said by the plaintiff's assignor with reference to a transfer of risk, which might enable the defendants to know how to act, or what was desired, or that a surveyor had never been sent, then they should find for the defendants."

The counsel for the defendants excepted to the charge of the court in every respect wherein it differed from the propositions submitted by him, or where it omitted to charge as requested in such propositions.

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The jury found for the plaintiff, subject to the opinion of the court, as before stated.

W. C. Noyes, for the plaintiff.

J. Sutherland, for the defendants.

HOFFMAN, J.—The material question in the case is, whether any agreement for a transfer of the risk to the goods of the store in Grand-street, other than an agreement in writing, could be binding upon the company.

It must be conceded that there could not be any valid original agreement to insure, by parol, to bind this company, however definite and however well proven. The case in the Court of Appeals of *The Baptist Church v. The Brooklyn Insurance Co.* settles definitely that a corporation authorized to make insurances in writing, cannot make them in any other manner. The opinion of Chief-Justice Marshall in *Head v. The Providence Insurance Co.*, (2 Cranch, 127,) is cited and relied upon. "The act of incorporation is to the corporation an enabling act. It gives them all the powers they possess. It enables them to contract, and when it prescribes to them a mode of contracting they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated."

Mr. Justice Gardiner quotes the charter of the Brooklyn company as providing, "that policies of insurance and other contracts founded thereon, shall be in writing, signed by the president, and countersigned by the secretary." It at first struck me that the charter of the present company was not so explicit or decisive as to the necessity of a writing as that of the Brooklyn company. The Acts of Incorporation are not referred to in the opinion; but we find them in the laws of 1824, ch. 166, in the laws of 1829, ch. 131, and in those of 1844, ch. 133. The provisions in the two last acts do not bear upon the present question.

By the 2d section of the act of 1824, the company had power to make contracts of insurance with any person against loss or damage by fire of houses, merchandise, etc., and there was no prescription of their being in writing. By the 10th section, however, policies of insurance, and other contracts founded thereon, though

not under seal, if subscribed by the president, (or, in certain cases, by another designated person,) and countersigned by the secretary, shall be binding and obligatory upon the corporation.

The present defendants were incorporated under the general act of April 10th, 1849. By the 3d section of that act, the persons proposing to associate themselves were to file a copy of the charter proposed to be adopted by them, and by the 10th section, it was made the duty of the incorporators to declare in such charter (among other things) the mode and manner in which the corporate powers given under such general act are to be exercised.

Accordingly, the present defendants adopted and declared a charter, and by its 10th section they provided, "that the president, or other person appointed by the board of directors for that purpose, shall be authorized in the name, and on behalf of, the company to make contracts of insurance with any person or persons against loss or damage upon any property on which this company may lawfully make insurance. The policies issued pursuant to such contract of insurance shall be signed by the president, and countersigned by the secretary of the company, or the same may be signed and countersigned by such other person or persons as a majority of the directors may appoint for that purpose; such policies shall be binding and obligatory upon the company in like manner and force as if made under the seal of the company."

It is deemed useful to refer also to the 11th section of the general act of April 10th, 1849, under which this company was organized. (Sess. Laws, ch. 308.)

My conclusion is, that no parol contract, and no written contract, however plainly made or adopted by directors or officers for an original policy of insurance, can be binding, unless it has received the signature of the president, secretary, or the other persons formally designated by a majority of the directors. Thus, the grave question of the possibility of enforcing a parol contract to insure will be found wholly inapplicable to the great body of the fire insurance companies of our state. See 1 Duer on Insurance, p. 61, and note 2, p. 100, and the valuable suggestions in Justice Gardiner's opinion as to the origin of policies being in the civil and not in the common law, as bearing upon the question of the necessity of a writing.

We thus come to the consideration of the true character of the

alleged agreement between the parties as to the continuance of the responsibility of the company after the removal of the goods.

It was not denied by counsel, and does not admit of denial, that between the 1st of February and the 1st of March, 1854, the policy was totally inoperative. Had a loss then occurred, no recovery could have been had. The insurance was upon goods in the store in Avenue D. It would have continued in force upon any substituted goods, replacing those disposed of in trade in the same place. It would also have so continued upon the same goods, if temporarily removed and then restored. Not being replaced or restored, the subject matter of the insurance was gone. The goods no longer existing in the place in which they were covered, there was nothing upon which the policy attached. The case is even stronger than that of *Dow v. The Hope Insurance Co.* in this court, (1 Hall, 172,) in which merchandise was insured outward, and then proceeds home, and it was held that the policy did not cover the same goods brought back in the vessel.

The policy, then, being inoperative, and the goods uninsured, the parol evidence is to establish that the goods were actually re-insured in their new location. In whatever form the proposition is presented, it really comes to this: goods not covered by an insurance are to be insured by means of a parol agreement made with an officer of the company.

Upon this question, the actual decision in the Baptist Church case, in the Court of Appeals, must be carefully examined. It is reported in the court below, in 18 Barbour, 69. The policy was executed on the 22d of July, 1845, insuring the church building against fire for one year. The policy was not delivered until some time after, and the premium was not paid until the 21st of February, 1846. The president of the company subsequently made an arrangement with the treasurer of the church, that the policy should be renewed from time to time, without further notice, until one party or the other should give notice of an intention to discontinue the renewal, up to which time it was agreed that the company should renew and give a certificate, the church paying the premium.

The last renewal certificate had been taken to the church after the 22d of July, 1847. The church was burned on the 10th of September, 1848. The renewal certificate which should regularly

have been sent about the 22d of July, 1848, had not been sent, nor had the company called for the premium. Justice Mitchell states, as the result of the evidence, that this was an agreement that the risk should be permanent, and the policy continued until either should vacate it, not for one year only, but for several—from year to year. After this it would be a breach of faith in the company to say that the policy should not be deemed in force unless they first gave notice to that effect.

On this state of facts the Supreme Court held the company responsible, and this decision was reversed by the Court of Appeals.

Mr. Justice Gardiner's opinion involves these important points. That it is extremely doubtful whether a verbal contract to insure can in any case be valid. The bearing of the opinion is decidedly hostile to it. That where the charter of a company prescribes that policies of insurance shall be in writing, signed and countersigned by particular officers, there can be no other mode of binding it.

That a verbal agreement between the officers and another to renew and continue a policy in force, whether made after or before the expiration, is not obligatory. I deduce that payment of the premium would make no difference. Upon the point of a distinction between a contract to make and one to renew a policy, he expresses himself thus: "It is, however, claimed that the contract in question is one to renew or continue an insurance, and is rather an agreement for a policy than a policy itself; but I am unable to see any difference in this respect between an agreement to insure, and one for continuing an agreement of that kind, which would otherwise expire by its own limitation. The new contract is founded upon the original policy which it adopts, and extends its provisions to another and distinct interval of time. It is either a policy of insurance for an indefinite period, or a contract presupposing a policy, and founded thereon, by stipulating for successive renewals. In either case the agreement must be in writing, and executed in the manner prescribed by the charter, in order to bind the corporation."

In the case of *Head v. The Providence Company*, (2 Cranch, 105,) relied upon in the Court of Appeals, there was a clause in the charter, "that all policies of insurance and other instruments

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made and signed by the president of such company, or any other officer thereof, according to the by-laws thereof, shall be good and effectual to bind such company to the performance thereof in manner as set forth in the constitution hereinafter recited."

The court say: "A contract varying a policy is as much an instrument as the policy itself, and therefore can only be executed in the manner prescribed by law. The force of the policy might indeed have been terminated by actually cancelling it, but a contract to cancel it is as solemn an act as a contract to make it, and to become the act of the company must be executed according to the forms in which they are enabled to act."

The Judge at the trial had charged that an agreement to correct the policy in question had been fully proven, and they must find for the defendants. On writ of error the judgment was reversed, for the reasons above stated. These authorities appear to me decisive, and to settle that the company could only have been bound to pay a loss on the goods removed, by a contract in writing, signed by the president and countersigned by the secretary.

SLOSSON, J.—In the case of the *First Baptist Church v. The Brooklyn Fire Insurance Company*, (18 Barb. 69,) the Supreme Court for this district decided that a parol agreement that the policy effected by the defendants should be renewed from time to time, without further notice, until one party or the other should give notice of an intention to discontinue; in other words, a parol agreement for a continuous risk, was valid and binding on the company, notwithstanding at the time of the loss the premium for the year had not been paid, nor the certificate of renewal given. The court treated it as an agreement to continue an insurance already effected, or an agreement for a policy, and therefore good, though not in writing, while they agree that a policy itself would not be good unless in writing.

This case was carried up on appeal, and the court of last resort reversed the judgment of the Supreme Court, and held that there was no substantial distinction between an agreement to insure; (a policy,) and one for continuing an insurance which would otherwise expire by its own limitation, and that in either case the agreement must be in writing, and executed in the manner prescribed in the charter, in order to bind the corporation.

The opinion of the court, as delivered by Gardiner, Chief-Justice, is not yet reported, and I was first made acquainted with it on the argument at General Term.

The charter of the Brooklyn Insurance Company provided that policies of insurance, and other contracts founded thereon, should be in writing, signed by the president and countersigned by the secretary.

By the 10th section of the general act of 1849, (Sess. Laws, ch. 308,) providing for the incorporation of insurance companies, and under which the present defendants were organized, it is required of every company organized thereunder to "declare in their charter the mode and manner in which the corporate powers, given under and by virtue of this act, are to be exercised."

Their charter accordingly provides, (§ 10,) that its officers therein designated, shall be authorized, in behalf of the company, to make contracts of insurance, and that the policies issued pursuant to such contracts of insurance shall be signed by the president and countersigned by the secretary.

In other words, its contracts of insurance must be in writing. It cannot be denied that the policy in the present case was applicable only to goods in the place in which they were insured, and could not be extended to the goods after their removal to Grand-street, except by express agreement of the company, and accordingly such an agreement is alleged in the complaint as the foundation of the action.

The effect of such an agreement would be, to make a new contract of insurance, the place where goods are insured being as much a part of the original contract as the stipulation of insurance itself. "A contract," says Judge Marshall, "varying a policy, is as much an instrument as the policy itself and therefore can only be executed in the manner prescribed by law." (*Head & Amory v. The Providence Insurance Co.*, 2 Cranch, p. 168.)

The agreement in the present case, if held to have been proved, was by parol only, and that not express, but by implication from the silence of the officers of the company, coupled with certain acts indicating that the question of extending the policy to the goods in the new place of their deposit had been taken into consideration.

I will not stop to inquire whether these acts were done by any

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officers authorized to bind the company, since under the decision of the court of appeals, in the case of the Baptist church, no officer could bind the company by a contract of insurance unless in writing; but I must be permitted to say, that I think good faith required of this company that they should have frankly informed the plaintiff of their intention not to continue the risk, if such was the resolution to which they had come, and not have left him to repose on the belief that he was insured, until the catastrophe had happened against which he supposed himself indemnified. It is true both the president and secretary of the company say that the application to transfer the risk was not made to them personally, and that they never consented to any transfer; but they both admit that the policy was lying in the office several months after it had been left for that purpose, and the secretary says "it was left for the purpose of having the risk transferred," and the president says, that after the fire it was laid before the loss committee. When the policy was left, on the 1st of March, it was entered by the clerk in a book as a case for survey, and the clerk said he would send a surveyor, when the plaintiff called again, on the 10th of April, for his policy, the clerk told him he need not call again, it would be sent to him. The plaintiff again sent for it, but did not get it. After the fire the president told him it was of no use to him.

About a week after the policy had been left at the company's office, a person did call to survey the premises to which the goods had been removed, and was identified by the witness as the same person who had surveyed the premises in Avenue D, where the goods were originally insured, yet the president says no survey was ever made to his knowledge—the surveyor himself was not put on the stand.

I advert to these features of the case, not as affecting the legal rights of the parties, but as showing an absence of that extreme good faith on the part of this company, or, to say the least, a want of that prudent and careful regard for the rights and interests of the plaintiff, which in every instance ought to characterize the transactions of these corporations with their dealers.

I think the decision of the Court of Appeals referred to must be considered as conclusive on the question involved in the present case, and that no written consent to a transfer of risk having

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been shown, the policy ceased to have any operation, by the removal of the goods from Avenue D to Grand-street, and the defendants are therefore entitled to judgment. (Code, § 265.)

The verdict must therefore be set aside, and the complaint be dismissed with costs.

ENO, Respondent, v. DEL VECCHIO & SNYDER, Appellants.

Where the owner of two adjoining lots of ground erects a building upon each with a partition-wall extending partly on each lot, used as a support to each building, and necessary to such support, and thereafter he, or his representatives, conveys the houses and lots separately to different persons, each purchaser acquires an easement, for the support of the house conveyed to him, in so much of the party-wall as stands upon the other lot.

Neither purchaser can lawfully remove or interfere with such party-wall, without the consent of the other, so as to injure the other's building. If he do so, though for the purpose of making improvements within the limits of his own lot, he is liable for such injury.

No degree of care or diligence in the performance of the work will relieve him from liability, if injury to the other in fact is caused by making such improvements. The party makes them at his peril.

Nor can he protect himself by making a contract for the work, with a third person exercising an independent employment. The act done is a trespass, and being done by the express direction of the party, both he and his contractor are liable for the consequences.

If the injured building be in the possession of a tenant for a term of years, the owner can only recover for the injury to the building itself, and not for the interruption or interference with the possession or use and enjoyment thereof.

For such injury to the building the owner may recover, notwithstanding his lease to his tenant contains a covenant binding the tenant to make all alterations and repairs during the term.

(Before HOFFMAN, SLOSSON and WOODRUFF, JJ.)

Heard, April; decided, June, 1856.

APPEAL from a judgment in favor of the plaintiff.

It was before the court upon a case containing the evidence and exceptions taken on the trial. The action was brought by the plaintiff, as owner in fee of the dwelling-house known as 496 Broadway, in the city of New York, to recover damages for the injuries alleged to have been done to his dwelling-house, by the wrongful disturbance and removal of an ancient party-wall, there-

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by depriving the house of the plaintiff of the support to which it was entitled. The defendants answered separately, and in their answers denied all the material allegations of the complaint.

The cause was tried before BOSWORTH, J., and a jury, in March, 1855, and after the cause had been opened on the part of the plaintiff, the counsel for the defendant moved the court for judgment for the defendants, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The court denied the motion, and the counsel for the defendants duly excepted.

The counsel for the plaintiff then proved that the premises 494, as well as 496, were portions of a row of similar buildings which had been erected previous to the year 1820, with partition-walls in common as at present, and then gave evidence tending to show that the defendants had lowered the floor of the first story of the premises 494 Broadway; that for that purpose the foundation of the division-wall between Nos. 494 and 496, on the north side of No. 494, had been cut down about eighteen inches; that the cellar of No. 494 had been dug down to about the same depth, and the division-wall underpinned; that in consequence thereof, the division-wall had settled down some two or three inches, carrying down the floors of 496, and that the front and rear brick walls of that building were cracked, and that the damage to No. 496 was from six hundred to fifteen hundred dollars. The plaintiff's witnesses testified that a common and proper manner of underpinning a wall, under which excavations to a small depth are made, is to dig out the earth in sections of two or three feet in length, and to underpin the wall in those sections before digging any more.

On the cross-examination of George Peckham, a witness on the part of the plaintiff, he testified that the premises, No. 496 Broadway, were leased by the plaintiff for a term of years by a written lease, to which he was subscribing witness. The counsel for the defendants called upon the counsel for the plaintiff to produce such lease. The counsel for the plaintiff produced the same, and the counsel for the defendants read it in evidence in the words and figures following, to wit:

"This agreement, made the eighth day of February, in the year 1851, between Amos R. Eno, merchant, of the first part, and Albert Losee, of the second part:

“Witnesseth, that the said party of the first part has agreed to let, and hereby does let, and the said party of the second part has agreed to take, and does hereby take, the house known as number 496 Broadway, in the city of New York, for the term of five years, to commence on the first day of May, 1851, and to end on the first day of May, 1856, and the said party of the second part hereby covenants and agrees to pay unto the said party of the first part, the yearly rent or sum of fifteen hundred dollars, payable quarterly, to wit, on the first days of August, November, February, and May, in each year. Also to make all alterations and repairs at his cost and expense. And also shall pay the regular annual charge or rent, which is or may be charged, assessed, or imposed, according to law, upon the said house or tenement for Croton water, and to quit and surrender the premises at the expiration of the term in as good state and condition as the reasonable use and wear thereof will permit, damages by the elements excepted. And the said party of the second part further covenants that he will not assign, let, or underlet, the whole or any part of the said premises, without the written consent of the said party of the first part, under the penalty of forfeiture and damages, and that he will not occupy the said premises, nor permit the same to be occupied for any business deemed extra hazardous, without the like consent under the like penalty, and the said party of the second part further covenants, that he will permit the said party of the first part, or his agents, to show the premises to persons wishing to hire or purchase, and on and after the first day of February next preceding the expiration of the term, will permit the usual notice of ‘To Let,’ or ‘For Sale,’ to be placed upon the walls or doors of said premises thereon, without hindrance or molestation; and also if the said premises, or any part thereof, shall become vacant during the said term, the said party of the first part may re-enter the same, either by force or otherwise, without being liable to any prosecution therefor, and to relet the said premises, as the agent of the said party of the second part, and to receive the rent thereof, applying the same first to the payment of such expense as he may be put to in re-entering, and then to the payment of the rent due by these presents, and the balance (if any) to be paid over to the said party of the second part. .

“And the said party of the second part hereby further cove-

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nants, that if any default be made in the payment of the said rent, or any part thereof, at the times above specified, or if default be made in the performance of any of the covenants or agreements herein contained, the said hiring and relation of landlord and tenant, at the option of the said party of the first part, shall wholly cease and determine. And the said party of the first part shall, and may re-enter the said premises and remove all persons therefrom. And the party of the second part hereby expressly waives the service of any notice in writing of intention to re-enter, as provided for in the third section of an Act entitled 'An Act to abolish distress for rent, and for other purposes, passed May 13, 1846.'

"In witness whereof, the parties to these presents, have hereunto set their hands and seals, the day and year first above written.

"ALBERT LOSEE. [Seal.]

"Sealed and delivered in }
the presence of }
"GEORGE PECKHAM.

"In consideration of the letting of the premises above mentioned, to the above-named _____, I hereby covenant and agree, to and with the party of the first part, above named, and his legal representatives, that if default shall at any time be made by the said _____ in the payment of the rent, and performance of the covenants above contained, on his part to be paid and performed, that I will well and truly pay the said rent, or any arrears thereof, that may remain due unto the said party of the first part, and also all damages that may arise in consequence of the non-performance of said covenants, or either of them, without requiring notice of any such default from the said party of the first part.

"Witness my hand and seal, the eighth day of February, in the year of our Lord, one thousand eight hundred and fifty-one.

"JACOB F. OAKLEY. [Seal.]

"Witness—GEORGE PECKHAM."

The said George Peckham further testified, that the plaintiff had received under protest, from the tenant, all the rents payable under

such lease, without any deduction for any injuries to the premises and that the plaintiff had paid nothing for any repairs of any injury complained of in the complaint in this action.

The counsel for the plaintiff then read in evidence a deed, bearing date the 19th day of January, 1844, made by John L. Lawrence, administrator of the goods, etc., of Isaac Lawrence, deceased, to the plaintiff, and one John J. Phelps; and also a deed, bearing date the 18th day of June, 1846, made by the said John J. Phelps to the plaintiff, in and by which deed the premises now known as No. 496 Broadway are conveyed by the following description:

“All that certain lot, piece, or parcel of land, situate, lying, and being in the fourteenth ward in the city of New York, bounded and described as follows: beginning at a point on the easterly side of Broadway, eighty-six feet northerly from the north-easterly corner of Broadway and Broome-street, running thence northerly along Broadway aforesaid twenty-three feet, thence easterly one hundred feet, thence southerly, parallel to Broadway, twenty-three feet, thence westerly one hundred feet to Broadway aforesaid; the said lot being now known and distinguished by the street number four hundred and ninety-six, (496,) Broadway, being the same premises conveyed to the said Amos R. Eno and John J. Phelps, parties hereto, by John L. Lawrence, administrator, etc., by indenture bearing date the nineteenth day of January, 1844, and recorded in the office of register of the city and county of New York, in liber 446 of Conveyances, p. 72.”

The counsel for the defendants admitted that the said John L. Lawrence had lawful authority to make said deed.

The counsel for the plaintiff offered in evidence a deed, bearing date the 20th day of November, 1839, purporting to have been made by Isaac Lawrence, and Cornelia B., his wife, to Julia B. L. Wells, for the premises now known as 494 Broadway, in which deed the said premises are described in the words and figures following, to wit:

All that certain house and lot of land, lying and being in the fourteenth ward of the city of New York, on the easterly side of Broadway, now known and distinguished as No. 494, in said street, bounded as follows, to wit: westerly, in front, on Broadway; easterly, in the rear, by land now or formerly of John Jacob Astor; northerly, by the house and lot of the said John Jacob

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Astor, containing in breadth, in front and rear, twenty-three feet, and in depth, on each side, one hundred feet, be the same more or less. The northerly wall of said house, hereby conveyed, being a party-wall, and the northerly side of said lot, hereby conveyed, being in a line through the centre of said wall.

The counsel for the defendants objected to the reception of said deed in evidence, on the ground that the plaintiff has complained as for injuries to an ancient wall, and is not entitled to give evidence by deed of a reservation to his grantor of an easement in the wall.

The court overruled the objection, and received the deed in evidence, to which the counsel for defendants duly excepted.

The counsel for the plaintiff then proved, that the defendant Del Vecchio is the lessee for a term of years of the premises at 494 Broadway, and that the defendant Snyder had made the alterations on those premises for the defendant Del Vecchio.

The counsel for the plaintiff rested his case, and the counsel for the defendant Snyder moved for a dismissal of the complaint, as to said defendant, on the grounds:

1st. There is no evidence to connect Snyder with the injury complained of. 2d. The plaintiff must elect whether he will go against Del Vecchio or Snyder. He can not sue both principal and agent in one suit. 3d. There is no proof showing that this would be an injury to the reversion—

Which motion was denied by the court, and the counsel for the defendant Snyder duly excepted.

The counsel for the defendant Del Vecchio moved for a dismissal of the complaint, as to said defendant, on the grounds:

1st. There is no evidence showing that the plaintiff had an easement in that part of the wall which stood on the defendant's lot. 2d. That the plaintiff, by his complaint, claims damages to both the possession and the freehold; the proof shows an outstanding lease for years, and the plaintiff is not entitled to recover for injuries to the possession, and can only recover for injuries to the freehold by complaining as reversioner. 3d. There is no evidence that Del Vecchio did the work which occasioned the alleged injury, or employed the men who did it. 4th. This action can not be maintained jointly against the principal and agent. 5th. There is no evidence to show that the alterations on the defendant

Del Vecchio's premises were done in a negligent or unskillful manner; but, on the contrary, the evidence is, that it appeared to have been done carefully. The complaint is not sustained by the evidence, and should be dismissed. 6th. The action is improperly brought. It should have been an action of trespass, and not on the case.

Which motion was denied by the court, and the counsel for the defendant Del Vecchio duly excepted.

The counsel for the defendants then gave evidence tending to show that the alterations in the premises No. 494 Broadway were made in a prudent and careful manner, that the undermining of the division wall was done in sections of two or three feet at a time, and that the division wall, and the front and rear walls of the plaintiff's house, were cracked at the time of the alterations in No. 494 Broadway.

The defendants also gave evidence tending to prove that the front of the building 496 Broadway had been so altered and repaired, as to make the same as perfect as before the alleged injury.

The counsel for the defendant Del Vecchio called as a witness upon his behalf the defendant John Snyder, who testified that he was employed by the defendant Del Vecchio under a contract to make the alterations on No. 494 Broadway, that he did make those alterations pursuant to such contract, furnished the materials therefor, and employed and paid the men who did the work; that before he commenced work he called on the tenant in possession of 496 Broadway.

The defendant Del Vecchio offered to prove, that before the work on 494 Broadway was commenced the witness called on the tenant in possession of 496, who was the assignee of the lease of the plaintiff to Losee, and notified him of the intention to make the alterations on No. 494, and that he assented thereto. The counsel for the plaintiff objected, the court sustained the objection, and the counsel for the defendant Del Vecchio duly excepted.

The counsel for the defendant Snyder offered to prove the same facts by the defendant Del Vecchio, the counsel for the plaintiff objected, the court sustained the objection, and the counsel for the defendant Snyder duly excepted. When the evidence was closed, the counsel for the defendant Del Vecchio

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moved the court to direct the jury to find a verdict in his favor, on the ground that it appeared that the work was done by the employees of the defendant Snyder, that the relationship of master and servant did not exist between the defendant Del Vecchio and the men who did the work, and he is not responsible for their negligence, which motion was denied, and the counsel for Del Vecchio duly excepted.

The counsel for the defendant Del Vecchio requested the court to charge the jury—

1st. That if Snyder did the work under a contract with Del Vecchio, and the work was done by Snyder's employees, Del Vecchio is not liable for their negligence, and the jury must find for him. 2d. That Del Vecchio had a right to cut down the wall, dig out the cellar, and underpin the wall on his own premises if he chose to do so, and would be responsible only for the negligence of his own immediate employees. 3d. That the wall in question is not, in view of law, a party-wall. 4th. That the defendants were not bound to give the plaintiff notice of their intention to cut down and underpin the wall.

The court refused so to charge, and the counsel for the defendant Del Vecchio duly excepted.

The counsel for the defendant Snyder requested the court to charge the jury—

1st. That if they should find for the plaintiff, he is only entitled to such damages as the plaintiff has sustained as reversioner only, after the expiration of the term of the lessee, and the plaintiff has given no evidence of such damages. 2d. That there must be some act as tortious, in which both parties concurred, before they can find for the plaintiff in this joint action. 3d. That as the plaintiff has a covenant to repair by the tenant, with security, the plaintiff is not shown to have sustained any injury in consequence of any of the acts complained of. 4th. That the mason was under no obligation to give notice of the doing of the work; that if there was any such obligation, it rested with Del Vecchio, and Snyder can not be held responsible for the omission.

The court refused so to charge, and the counsel for the defendant Snyder duly excepted.

The court charged the jury that where an owner conveys land, declaring a wall to be a party-wall, each subsequent owner of the

land so conveyed, and of the adjoining land, has a perfect right to have the wall continued as it was, without any alterations, except by his consent, and that if either of such owners should make any alterations to such wall upon his own side thereof, without the consent of the other, he would be liable to such other owner for any damages sustained by reason of such alterations.

To which charge the counsel for the defendants duly excepted.

The court also charged, that if, by reason of the alterations to the party-wall, the plaintiff has sustained damage, both defendants are liable for the whole damage.

To which charge the counsel for the defendants duly excepted.

G. W. Stevens, for the defendant Del Vecchio, now moved for the reversal of the judgment, and a new trial, and insisted upon the validity of all the exceptions taken on the trial. He cited, among other authorities, the following: (4 Comstock, 196; 1 Seld. 48; 1 Maule & Selw. 234; 5 Cush. 592; 4 Exch. Rep. 24; 1 Eng. Law and Equity Rep. 477; 6 Bing. 1; 9 Barn. & Cres., 725.)

H. Brewster, for defendant Snyder.

C. A. Nichols, for plaintiff, argued at large, that none of the exceptions taken on the trial could be sustained, and insisted that the charge of the Judge was throughout correct, and in accordance with the rule of law; that a party who contemplates alterations upon his own premises, endangering those adjoining, must give reasonable notice, and is chargeable with all the consequences of a neglect to give such notice; he cited 4 Paige, 169; 9 Barn. & Cres. 725; 1 Crompton & Jarvis, 20. He also insisted that the plaintiff had an easement in the use of the wall in question by prescription and by grant. He cited 12 Mass. 157, and *Gale and Wansly's case*, 9 Barn. & Cres. 148 to 161.

BY THE COURT. WOODRUFF, J.—When this case was before the court in October, 1854,* nearly all of the questions raised by the present appeal were presented to the consideration of the court. We regard the opinion then given as so far conclusive

* Reported 4 Duer, 58.

upon those questions, that it is not proper to open them here for discussion. That opinion must therefore be taken as the opinion of the court in relation to all matters embraced therein, or which are impliedly covered thereby.

It was then decided that, in any view of the rights and liabilities of the parties, the plaintiff was entitled to notice of the defendants' design to take down the wall in question; but that if it was found that the wall in question was a party-wall, then that the question of notice or no notice to the plaintiff was immaterial, because in that case the defendant had no right to interfere with the wall at all without the plaintiff's consent, unless he could do so without injury to the plaintiff's building.

Under what circumstances the wall is to be deemed a party-wall, is stated, so far as is material to the present case, in the following propositions, with the conclusions therefrom:—

“1st. If the owner of two adjoining lots erects buildings upon them with a wall partly on each, to be used as a support to both buildings, and which is necessary to furnish such support, and which is used for that purpose from the time of its erection, a conveyance of either house and lot, with its appurtenances, grants an easement, for the support of the house so conveyed, in so much of the wall as stands on the other lot.

“2d. After such a grant and a continued use of such party-wall, to support both buildings for more than twenty years, neither can remove the wall, nor so deal with it as to render it an insufficient support for the other's building, without his consent. If he does he is liable to the other for the injury.

“3d. If either wishes to improve his own premises before the party-wall has become ruinous, or incapable of further answering the purposes for which it was erected, he may underpin the foundation, sink it deeper, and increase, within the limits of his own lot, the thickness, length, or height of the party-wall, if he can do so without injury to the building on the adjoining lot; and to avoid such injury he may shore up and support the original party-wall a reasonable time to excavate and place a new underpinning beneath it.

“4th. But he cannot interfere with it in any manner unless he can do so without injury to the adjoining building, or without the consent of the owner of such building.”

In regard to the rule of damages, in case the plaintiff should be under these propositions entitled to recover, the rule is stated to be that "he will be entitled to recover such sum as will put him in the state in which he was before the injury;" in other words, he is entitled to be "indemnified to the full extent of the injury occasioned."

Both upon the former trial and upon the present, it appeared that the premises owned by the plaintiff were under lease to the tenant in possession thereof, which lease would not expire until the first day of May, 1856, and that, in addition to the covenant by the tenant for the payment of rent, there was a covenant "also to make all alterations and repairs at his own cost and expense."

The evidence upon the new trial ordered by the General Term showed, that the two houses referred to were "portions of a row of buildings erected previous to 1820, with partition-walls as at present." Also that Isaac Lawrence, under whom the defendant Del Vecchio holds, conveyed the lot held by the said defendant in 1839, describing the wall in question as a party-wall, and that the administrator of the said Isaac Lawrence, (under authority for that purpose admitted by the defendants,) conveyed the plaintiff's lot to him. Although the deeds were objected to, it is on this appeal conceded that their admissibility was in substance decided by the General Term by the opinion above referred to.

The evidence was that the defendant Del Vecchio, being lessee of one of the buildings, employed Snyder, his co-defendant, to make alterations, digging down the foundations and lowering the floor, making the cellar also deeper, and in consequence of his doing it, the wall in question settled, and the front and rear walls of the plaintiff's house were cracked, and that the damage to his building was from \$600 to \$1,500.

On the trial the defendants offered to prove, each by the other of them, notice to the tenant in possession of the plaintiff's house, of an intent to make the alterations, and that he assented thereto. The plaintiff's objection to this evidence was sustained, and we think properly sustained.

First, because this defence, if it was a defence, was not peculiar to either defendant; if good as to either, it was so as to both. But *secondly*, and quite conclusively, because the assent of the

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tenant could only affect his right to complain of what was done, and could not prejudice the plaintiff. The tenant had no authority, express or implied, for any such purpose. He had no right to commit waste himself and could not authorize another to do so.

The charge of the Judge appears to us to be in entire conformity to the decision of the General Term, in relation to what constituted a party-wall, and the rights and liabilities resulting from the common interest therein.

It is suggested that the defendant Del Vecchio is not responsible for the acts of Snyder his employee. The cases relating to the liability of a person for the negligence of another, who stands to him in the relation of an independent contractor, and not of servant, have we think no application to the present case. Here one defendant employs and directs the other defendant to commit a trespass. Both are liable for the consequences jointly and severally. The question of negligence was wholly immaterial, or at least it was wholly unnecessary that the plaintiff should prove any negligence. The trespass was committed at the peril of being responsible for all the injury sustained by the plaintiff.

The only other question which it is necessary to notice is, whether the rule of damages was correctly stated to the jury.

The views of the court at General Term on that point are above stated. The charge to the jury was as follows: "That, as the plaintiff had leased the premises before the injury complained of, for a term of years which had not yet expired, and was not in possession of the premises, he could not recover for any interruption in or interference with the use of the premises, nor because the use and enjoyment of them had been rendered less valuable to the lessee or his tenants." This is not the subject of exception, it is within the conceded rule that the plaintiff cannot recover for an injury to the possession merely.

The charge further proceeded, "that he could only recover for damages to the structure itself.

"That the jury would inquire what it would cost to repair the injuries done to the building itself and restore it substantially to the condition it was in before it was injured by the acts complained of: that amount, and no more, the plaintiff was entitled to recover."

To this last paragraph the defendant's counsel excepted.

They urge that the plaintiff in his complaint does not describe himself as reversioner, and, therefore, cannot under this complaint recover at all. This point was not only sufficiently disposed of on the former argument, but it appears to us to be without foundation. The plaintiff complains that the defendants' acts injured his house, damaged its walls, etc., etc., and although he avers that he was disturbed in the use and enjoyment thereof, the other averments are sufficient, though the latter is not proved. If it were deemed necessary to insert the prior condition of the plaintiff's title in this respect, we should not hesitate to direct an amendment conforming the complaint to the fact proved.

No other objection to this part of the charge is stated, except that because the tenant had covenanted to make all alterations and repairs, therefore the plaintiff cannot proceed against the wrong-doers. We know of no such rule, and no authority is cited in support of the proposition. There can be but one satisfaction for the same wrong, and to that satisfaction the plaintiff is at all events entitled. It does not lie with the wrong-doer to say, "I will not make compensation to the owner, because he has it in his power to seek redress against another person."

If it were conceded that the tenant was, under the covenant above referred to, bound to repair damages of this description, caused by a wrong-doer, and that he might, therefore, have had an action for this same injury, the case would not be widely different from the very common examples in which one who has a special property in a chattel, as bailee, may recover against a wrong-doer for an injury done thereto, and yet no one supposes that the owner himself may not maintain the action. It is enough that there can be but one satisfaction.

It has not been claimed that the measure of damages, i. e., the actual cost of repairing the wall, was too enlarged a measure, and probably, on observing that the evidence given is stated in the case to have "proved" that the damage was from \$600 to \$1500, and that the jury found for the plaintiff only \$350, the defendants have no occasion to complain of the rule, in fact, adopted by the jury in this respect.

The judgment must be affirmed with costs.

CHITTENDEN v. THE EMPIRE STONE-DRESSING CO.

Where, upon a trial, the Judge directed a verdict to be taken, subject to the opinion of the court at General Term, the judgment there to be entered, and the facts are admitted or fully proven, and nothing for the jury to pass upon, the judgment may be rendered for a dismissal of the complaint, as well as, in a proper case, for the plaintiff.

Such was the former practice, and the Code has not changed it. The case of *Aster v. L'Amoureux*, (4 Selden, 159,) and of *Marquart v. Marquart*, (2 Kernan, 338,) are not repugnant to it. They preclude the General Term from deducing facts from testimony, and on these deductions giving a judgment. But the principle of sending a case to the General Term, under the 265th section is to procure the judgment of law upon established facts—facts admitted or duly proved.

(Before HOFFMAN, SLOSSON and WOODRUFF, J.J.)

Heard, April; decided, June, 1856.

Andrews, for plaintiff.

Sandford, for defendants.

The facts are stated in the opinion.

HOFFMAN, J.—This case arises on a verdict of a jury, taken subject to the opinion of the court at General Term, judgment there to be entered, with liberty to turn the case into a bill of exceptions.

The action is brought upon a promissory note made by the defendants, dated the 9th of May, 1854, in favor of E. E. Jarman, for the sum of \$1,000. It was endorsed by Jarman, and then by Charles T. Shelton. The note was made for the accommodation of the defendants, was procured to be discounted for their benefit by Shelton, and he credited the amount to such defendants on his books in May, 1854.

One N. A. Condrey, of New Haven, Connecticut, discounted the note. The note got into the hands of one Losen Condrey, who sued Shelton upon it in Connecticut, and obtained a judgment, upon which his property was set off and stocks sold, so that the whole amount was satisfied, and the sum of eighteen cents returned to the judgment-debtor, Shelton.

After this satisfaction, the attorney of Losen Condrey delivered the note, and, as he states, transferred all the right of said Condrey in it to the present plaintiff, receiving from him \$137, which he claimed as a balance still due upon it, notwithstanding the satisfaction of the execution. He deposes that Shelton gave his assent to this transfer; that he had told Shelton what he had done, who replied that it was all right. Shelton states that he had no knowledge when or by whom the note was transferred to the plaintiff.

It is manifest, upon these facts, that if Shelton could not sustain an action against the defendants the plaintiff cannot. Shelton, as indorser, had paid the note in full; Condrey, the holder, had no interest to transfer to the plaintiff. The attorney, demanding a right to it, for \$137 delivers it to the plaintiff. Suppose the statement true, that Shelton assented to this; in other words, that he had got the note and delivered it, for \$137, to the plaintiff. He would take it, subject to every right, legal or equitable, between Shelton and the defendants, and on the case as now presented, Shelton admits himself to be the debtor of the defendants for the whole avails of the note which he procured to be discounted.

It is manifest, we think, that there was something in the transaction not in evidence; but it is equally plain, that there is no possible ground to hold the defendants liable in this action.

The next question is, what determination can we make of the case?

After the plaintiff had rested, the defendants' counsel moved for a nonsuit, on a ground not necessary to state, which was denied.

The defendants having then gone into evidence and rested, moved for a dismissal, on the ground that the plaintiff had not proved his title to the note; that it appeared the same belonged to Shelton.

The Judge ruled that the plaintiff should show further evidence of his title. He then called on the attorney of the plaintiff in the suit in Connecticut, who deposed as before noticed.

All the evidence being closed, the Judge ordered a verdict to be entered for the plaintiff, subject to the opinion of the court at General Term, on a case to be made, with liberty to turn the case into a bill of exceptions.

The case, then, is this: there was nothing at the trial to sub-

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mit to the consideration of the jury; no question of fact whatever. The Judge, in directing a verdict subject to the opinion of the court upon a case, directs substantially that the questions of law arising upon the facts, proved or admitted, be submitted to the court at General Term.

It comes, then, precisely within the last clause of the 265th section of the Code, that where upon a trial the case presents only questions of law, the Judge may direct a verdict subject to the opinion of the court at a General Term, "and in that case the application for judgment must be made at the General Term."

Does not this mean an application for judgment of dismissal by the defendants, as much as an application for judgment according to the verdict for the plaintiff?

By the former practice, upon a case made under a direction at the circuit, for a verdict subject to the opinion of the court, a judgment for the defendant could be given, and the practice was settled that the *postea* ought to be stayed in the hands of the clerk at the circuit until the decision of the question, and the verdict and judgment were then entered for the plaintiff or defendant as the case might happen. (*Jackson v. Fitzsimmons*, 6 Wendell, 546.)

In *Astor v. L'Amoureux*, (4 Sandf. Sup. Ct. Rep. 537,) the cause had been tried without a jury, and judgment (*pro forma*) entered, in order to have the case presented to the General Term. This was under a previous order granting a new trial. The court considered that it possessed the same power as upon an appeal to the Court of Appeals, and under the interpretation of the word "modify," in section 330, could give such a judgment as the inferior court ought to have rendered, and thereupon entered judgment for the defendant.

Upon appeal (4 Selden, 109) the court reversed this judgment, stating that there was error in ordering final judgment upon a case made at the trial. The Superior Court was only authorized to grant a new trial.

Upon referring to the report in 4th Sandford, we find that the General Term passed distinctly upon the evidence, as establishing certain material facts which it was clear a new trial could not vary. This case is not an authority decisive of the present question.

In *Marquart v. Marquart* (2 Kernan Rep. 338) the testimony had

been taken by consent before a referee, and the case tried without a jury, on pleadings and depositions. The Judge at Special Term directed a judgment, which, on appeal, was reversed, and the complaint dismissed with costs.

On appeal Justice Johnson said: When the facts are ascertained upon the trial, either upon special verdict or any other form of finding allowed by the court, the general question, which party is entitled to judgment, arises upon appeal, and in such cases a judgment disposing of the whole cause may be given at General Term, notwithstanding such judgment be adverse to that given at the Special Term.

But when the case is brought for review at the General Term upon an allegation of error in the trial—in the process of ascertaining the facts—the only judgment which can be given for the appellant is one ordering a new trial.

The court, however, proceeded to observe, that the question of law which formed the ground of decision at the General Term was one which would necessarily arise upon another trial, and which, therefore, it was proper to examine here. The court disposed of the case by affirming the judgment at Special Term.

In these cases we find that the General Term had founded its decisions upon its own exposition of the evidence; in other words, finding the facts. This is all that is expressly held to be erroneous. The present case is wholly different.

The exceptions taken by the plaintiff in the course of the trial to the ruling of the Judge were, the admission of the deposition of Shelton, the record of the judgment in Connecticut, the ruling that the plaintiff must give further proof of title to the note after the defendant had rested, and an exception to his offer to prove by the attorney that the balance which he claimed as due on the note was the avails of property sold as the property of Shelton, but which, in fact, belonged to one George Bliss.

The stock which had been sold as the property of Shelton, to pay the execution, stood on the books in the name of Bliss.

There is not a point made by the plaintiff's counsel as to these supposed erroneous rulings. If there had been, the objection appears to us wholly untenable. The last is the only one which might deserve notice; but the answer is, that Bliss has never asserted any claim to the stock sold by the sheriff, and the note was

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fully paid out of what must be assumed to have been Shelton's property.

There must be judgment for the defendants, dismissing the complaint with costs.

HENRY SUYDAM, Jr., ALMET REED, and DANIEL R. SUYDAM
v. WILLIAM B. BARBER, GEORGE W. GIRTY, and JAMES
DORAN.

A firm in Missouri drew two bills of exchange upon a firm in New York, one dated in St. Louis, Missouri, and the other in Ohio. The firm in New York accepted and paid the bills, not having any funds of the drawers in their hands. Barber, one of the members of the firm in Missouri, was sued in a tribunal of that state, upon the bills, without joining his partners, the two other defendants, in this action. After pleading what is equivalent to the general issue, he gave a *relicta*, and thereupon judgment was rendered against him for the amount of the bills, interests, and costs.

Two statutes of Missouri were produced in evidence. By one of them it is provided "that all contracts which by the common law are joint only, shall be construed to be joint and several; next, in all cases of joint obligations, or joint assumptions of copartners, or others, suits may be brought and prosecuted against any one or more of those who are so liable." By the other statute it is enacted, "that every person who shall have a cause of action against several persons, and be entitled by law to only one satisfaction therefor, may bring suit thereon jointly, against all, or as many of the persons liable as he may think proper."

Held, that the effect of these statutes was to convert the joint liability of the partners, upon the bills, into a joint and separate liability, and that an action in Missouri would clearly be maintainable against the other partners, notwithstanding the judgment, had the contract been made there.

Held, that the fact of the contract being made in the state of New York, where a different rule prevails, would not have been sufficient to defeat such an action in Missouri.

But held, that as the contract was made in this state, the money was advanced here, the plaintiffs lived here, and the action was brought here, the law of New York, and not that of Missouri, must govern; and as the separate judgment merged the demand, the defendants other than Barber were discharged.

(Before HOFFMAN, SLOSSON and WOODRUFF, J.J.)

Heard, April; decided, June, 1856.

THIS cause was tried before Oakley, Chief-Justice, by the consent of parties, without a jury, on the 22d of February, 1856. When the testimony on both sides was closed, the Judge dismissed the complaint; the plaintiffs' counsel excepted to the decision,

and the Judge directed the exceptions to be heard in the first instance at the General Term, and judgment, in the mean time, to be suspended.

The following are the material facts, as they appear from the pleadings and the evidence on the trial.

The action was brought upon two bills of exchange drawn by the defendants in their partnership name of Barber, Girty, and Doran, upon the plaintiffs in New York, under the firm name of Suydam, Reed & Co.

The first of the bills was for \$5,000, and dated the 25th of November, 1845, at four months; the second was dated the 26th of January, 1846, for \$8,300, at forty-five days after date. The first bill was dated at Cincinnati, in Ohio; the second at St. Louis, in Missouri. Both bills were accepted and paid by the plaintiffs. They had no funds of the defendants at that time, or since, in their hands to meet or pay such bills; and they, therefore, allege an indebtedness of the defendants to them, by reason of their advances to pay the same. The complaint asks for judgment for the sum of \$6,630.89, being the balance due on such bills, including interest to the 16th of September, 1854.

The defence, as stated in the answer is, that a suit was brought in the St. Louis Court of Common Pleas, in the state of Missouri, in February, 1848, against the defendant Barber alone, for the same cause of action as is involved in the present suit; and that in October Term, 1848, judgment was recovered against said Barber for the amount of \$6,415.10. There is a further allegation, that the judgment thus recovered has been fully satisfied.

At the trial it was admitted that the bills were duly endorsed by the payees thereof, and accepted and paid by the plaintiffs for the accommodation of the defendants. That the plaintiffs were without funds to pay the same; that the defendants provided no funds, and had not paid the bills.

The judgment record of the recovery in Missouri shows a declaration containing several counts. In one it is alleged that the defendant, in consideration that the plaintiffs, at the request of the defendant and for his accommodation, had accepted a certain bill of exchange for \$8,300, (one of those now sued upon), drawn by Barber, Girty, and Doran, a firm of which the defendant was then a member, upon the plaintiffs, promised to furnish them with

The defendant Barber was personally served, according to the practice in Missouri, on the 7th of March, 1848; and appeared and filed a plea equivalent to the general issue.

“SUYDAM, REED & Co., plaintiffs, }
v. }
 WILLIAM B. BARBER, defendant. }

“In the St. Louis Court of Common Pleas, judgment for \$6415.10, October 31st, 1848, upon a conditional compromise made by defendant, by giving \$500 cash, and five notes, for \$500 each, at one, two, three, four and five years from date, pursuant to the terms and conditions of a bond of this date, from William B. Barber to Suydam, Reed & Co. I, as attorney, order the said

judgment in this case to be satisfied of record, by order of the plaintiffs.

BRITTAN A. HILL, for EAGER & HILL,
“Attorneys of Record for plaintiffs.

“ST. LOUIS, *June 1, 1852.*”

The bond referred to in this instrument was dated the 1st of June, 1852, and was given by Barber alone to the plaintiffs, acknowledging himself indebted in the penalty of \$12,000. It recited the judgment; that Barber had compromised the same, conditionally, upon the terms stated; that, in case of failure to pay the notes, or either of them, the cash paid, and the amount of any of the notes paid, was to be credited on the judgment, and the whole balance was to be deemed immediately due; that, upon such considerations, the plaintiffs had ordered said judgment against Barber to be satisfied upon the conditions and by virtue of the bond; that the debts evidenced by the judgment were to remain in force until all the notes were paid. It then declared “that the satisfaction of such judgment is in nowise a payment of said debt.” The condition was, that Barber would pay the notes at maturity, with interest thereon.

The introduction of this bond in evidence was objected to by the defendants’ counsel.

Any difficulty, as to the point on which of the counts the assessment of damages was made, is removed by the admission of the plaintiffs, that the drafts in suit were among those mentioned in the judgment record.

A statute of Missouri, afterwards noticed, was read in evidence.

The defendants’ counsel moved, at the trial, to dismiss the complaint, on the ground that the recovery of the judgment in Missouri against the defendant Barber, and the subsequent entry of satisfaction thereof by the plaintiffs, extinguished the indebtedness of all the defendants upon the bills. This motion was granted, and the ruling excepted to. The exceptions were directed by the Judge to be heard, in the first instance, at General Term, and the judgment was suspended.

Willard, for the plaintiffs.

Carter, for the defendant Girty.

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HOFFMAN, J., delivered the opinion of the court. The question is, what is the effect of the judgment recovered in Missouri against Barber, one of the parties to the bill of exchange, upon the action here?

If that judgment had been recovered in any competent tribunal of this state, or of any sister state, without such a particular statute as exists in Missouri being before us, the case would be a simple one. The authorities are decisive, that a judgment recovered upon a note, given by one copartner for the debt of the firm, or a judgment against one upon the original cause of action, is a bar in favor of the rest, to a subsequent suit. (*Peters v. Sandford*, 1 Denio, 224; *Pierce v. Kearney*, 5 Hill, 85; *Robertson v. Smith*, 18 Johnson's Rep. 459; *McMasters v. Vernon*, 3 Duer's Sup. Court Rep. 250.)

The sections of the statute of Missouri referred to are as follows: "1st. All contracts which by the common law are joint only, shall be construed as joint and several. 2d. In all cases of joint obligations and joint assumptions of copartners or others, suits may be brought and prosecuted against any one or more of those who are so liable." (Rev. Stat. Missouri, 1845, p. 112.)

The first of the important questions discussed by counsel which I shall examine is, the effect which we are warranted in supposing would be given to the judgment in the courts of Missouri, if the present action had been brought there.

Besides the statute before quoted, there is another provision of some consequence. It is, that "every person who shall have a cause of action against several persons, and be entitled by law to only one satisfaction therefor, may bring suit thereon jointly against all, or as many of the persons liable, as he may think proper." (R. S. 812, § 20.)

The holder, then, of a bill of exchange or promissory note, accepted or drawn by partners, could sue one of them alone; and it seems almost necessarily to follow, that a recovery on such a suit for a separate liability would not preclude an action against the others. It becomes, by force of the statute, the ordinary case of a joint and several responsibility, when a recovery against one without actual satisfaction, would be no bar to an action against the other. This common law rule has been regulated by various statutes in many states. (Chitty on Pleadings, vol. i, p. 43, a. 4.)

When, therefore, the plaintiffs had elected to sue in Missouri one defendant, they sued under provisions of a statute passed before the contract, and valid in that state. Had the contract been made there, a subsequent action against the other partners, brought in that state, could have been sustained. And thus, if a suit had been brought in Missouri like the present, the question would have been reduced to this—whether the contract, treated as made in New York, would vary the rule otherwise applicable?

Without entering into a question which would lead us far into a difficult subject, I may observe, that it appears to me difficult to support the proposition that the law of New York as to a separate judgment discharging a joint liability, so enters into the contract, that the law of another state, in which the suit is brought, holding that it shall not have that effect, would be unconstitutional. What is it in reality but a mode of redress? Instead of being obliged to sue altogether, and take, as in New York, a judgment, effective by execution only against joint-stock property, and against those served, you may sue one alone, take the proper relief against him, proceed afterwards against the rest, and get further relief against them.

But the question is, must not the case be governed by the law of New York? The contract was made here; the bills were drawn in Ohio and Missouri upon a house here, and the parties were and are resident here. The money was paid in New York. In truth it was a mere advance of money for the use of the defendants, with the bills for vouchers. The contract to repay arose in the place where the loan was made; and the parties are sued here. Can, then, the existence of a different rule in Missouri change the rule in New York, or prevent its application?

The constitutional provision is, "that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state; and Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." Congress, then, in the statute of 1790, provided, "that such records and judicial proceedings (authenticated as therein prescribed) shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the state from whence the said records are or shall be taken."

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Is it the meaning of the act that the judgment is to have the same operation in every other state as it had as a judgment in the state in which it was rendered, or is it that it shall have the same operation as a domestic judgment would have in the state in which it may be produced?

Justice Wayne, in *McElmoyle v. Cohen*, (13 Peters, 326,) says, "that faith and credit, then, is given in the states to the judgments of their courts. They are record evidence of a debt, or judgments of record, to be contested only in such way as judgments of record may be; and consequently conclusive upon the defendant in every state, except for such causes as would be sufficient to set aside the judgment in the courts of the state in which it was rendered. In other words, as has been said by a commentator upon the constitution: "If a judgment is conclusive in a state where it is pronounced, it is equally conclusive everywhere in the states of the Union. If re-examinable there, it is open to the same inquiries in every other state. (Story's Com. 183.) It is therefore put upon the footing of a domestic judgment; by which is meant, not having the operation and force of a domestic judgment beyond the jurisdiction declaring it to be a judgment; but a domestic judgment as to the merits of the claim, or subject matters of the suit."

The application of the rule thus stated in the Supreme Court, in the case cited, was this: the action was in the state of Georgia, upon a judgment recovered in South Carolina. A plea of the statute of limitations of Georgia was interposed and supported. There was an express statute in Georgia that actions of debt on judgments obtained, in courts other than the courts of the state, must be brought within five years after judgment obtained.

The court declare that a plea of the statute of limitations was a bar to the remedy, and consequently the *lex fori* must prevail. And the court say: "There is no direct constitutional prohibition upon the states, nor any clause of the constitution from which it can be even plausibly inferred, that the states may not legislate upon the remedy in suits upon the judgments of other states, exclusive of all interference with their merits. Suits must be brought upon judgments within the period prescribed by the local law, the *lex fori*, or they will be barred."

In the *Bank of Alabama v. Dalton* (9 Howard, 528) the decision

cited was affirmed, and Justice Catron, in delivering the opinion of the court, observes: "The legislation of Congress amounts to this—that the judgments in another state shall be record evidence of the demand, and that the defendant, when sued upon the judgment, cannot go behind it and controvert the contract or other cause of action on which the judgment is founded; that it is evidence of an established demand, which, standing alone, is conclusive between the parties. This is the whole extent to which Congress has gone. As to what further 'effect' Congress may give to judgments rendered in one state, and sued on in another, does not belong to this inquiry. We have to deal with the law as we find it, and not with the extent of power Congress may have to legislate further in this respect. That the legislation of Congress, as far as it has gone, does not prevent a state from passing acts of limitation to bar suits on judgments rendered in another state, is the settled doctrine of this court." See further the learned opinion of Justice Wayne in *Townsend v. Jamieson*, (9 Howard, 407.)

In the case of the *Bank of the United States v. The Merchants' Bank of Baltimore* (7 Gills. Mary. Rep. 416) the construction of the Constitution and act of Congress was carefully considered. It was held that a judgment recovered in Pennsylvania between the same parties, for the same cause of action, might be specially pleaded to an action in Maryland, though commenced first and pleaded to. That such judgment was as conclusive evidence of a debt from the defendant to the plaintiff in Maryland as it was in Pennsylvania. That the original cause of action was merged there by the judgment, and therefore was extinguished in Maryland. Hence that the action of assumpsit could not be maintained.

The exposition of the statute is thus expressed by Judge Le Grand: "Judgments of a state court shall have the same faith and credit and validity as in the state where they were rendered, so far as their existence, and their conclusiveness on the merits of the original cause of action is concerned, and therefore are not to be impeached, except on the ground of a want of jurisdiction or fraud; but beyond this they are to be considered as foreign judgments, and to be dealt with accordingly." The same doctrine is substantially stated by Martin, Justice, in the court above.

Brayle v. McClellan, (7 Gill. & John. 443,) in the Court of Appeals of Maryland, determined that the judgment of another state

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was not to be placed on a footing with a domestic judgment in the distribution of assets, but was to be treated only as a foreign judgment, and therefore a simple contract debt, according to the original character of the demand. Although the judgment had a preference in Pennsylvania, where it was obtained under a statute, it had none in Maryland, where the assets were distributable under the law of that state.

In *Candee v. Clark & Brown* (2 Michigan Rep. 255) the plaintiff had recovered, in a court in Ohio, a judgment against one of the parties to a promissory note, signed in their partnership name. In an action upon the note, in Michigan, against both, it was held that the judgment was a bar to the recovery. The original joint liability being at an end, the note was no longer a subsisting contract against both. The plaintiffs had elected to proceed to judgment against Brown alone, under the statute of Ohio.

I have carefully examined the statute book of Ohio, and find no such provision as in Missouri, (Chase's Stat. Ohio, vol. 3, p. 1680.)

The general principle of law, independently of the effect of the Constitution and act of Congress referred to, would decide this case in favor of the defendants. Although the law for expounding a contract is the law of the place in which it was made, the remedies for enforcing it must be the law of the place in which it is sued. *Doun v. Lippmann* (5 Clark & Finelly, 1) is a leading authority upon this point in the House of Lords. And in *Townsend v. Jamieson* (9 Howard, 407) the Supreme Court state the rule thus: "The obligations of the parties to a contract, except in a well-known case, are to be expounded by the *lex loci contractus*. Suits brought to enforce contracts, either in the state where they were made, or in the courts of other states, are subject to the remedies of the forum in which the suit is brought, including the statute of limitations."

We may also refer to that class of cases in which such judgments are disregarded, when they have been recovered in other states against parties not served with process, or not appearing voluntarily. It is sufficient to refer, on this point, to the cases in this court of *Harrod v. Baretto*, (1 Hall, 155; 2 Hall, 302,) and *Wilson v. Niles*, (2 Hall, 358). In the latter case there was a judgment in Alabama against three partners upon a bill of exchange of the firm.

One was served, and by a statute of that state it is provided, "that where the suit is against all, and one is served, the plaintiff may proceed to judgment as if the writ had been served on all, and the judgment shall be equally valid and effectual." The defendant in the suit in this court had not been served, and the court held, that the law of Alabama could not give jurisdiction over his person, as he was not within that state when the judgment was rendered, and that the judgment, therefore, neither bound him personally, nor his separate property.

In the present case we are called upon to give to the judgment of the tribunal of Missouri a totally different effect from that we would give to a judgment in another court of our own state. We have not found an authority to show that such a judgment shall, in its operation, go beyond, or have a different effect from, a mere domestic judgment. We are required to attribute such variant operation to it, by force of a statute of Missouri, inconsistent with the settled law of New York. In effect, then, the foreign statute would supersede the domestic law. We do not think that any rule of judicial comity, or any construction of the law of Congress, renders this obligatory; on the contrary, we apprehend that entire deference to both is rendered when the judgment in question is held to be absolutely conclusive upon the defendant Barber, as to his responsibility for the demand upon the bill, as he has not questioned the jurisdiction of the court or the fairness of the proceedings; but that as to the other defendants, the law of this state must prevail, and by that law the separate judgment has merged the demand.

We conclude that the judgment at Special Term dismissing the complaint must be affirmed, with costs.

COSTER and others, appellants, v. THE N. Y. AND ERIE R. R. Co. and DANIEL DREW, respondents.

Where the plaintiffs and other persons were joint owners of a steamboat, and entered into a contract with one of the defendants, by which the latter hired the boat and agreed to pay to the owners one hundred dollars per day for the use thereof; in an action to recover such compensation all the owners must join.
A joint cause of action vested in two or more cannot be split up into several at the

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option of those in whom it is vested ; the defendant is not liable to be vexed with two or more separate suits for the same cause of action, and be compelled to litigate with each part owner separately.

If any of the boat owners refuse to become plaintiffs, they should be made defendants. The fact that the part owners who are not made parties sold their shares or parts of the boat to the defendant, for whose benefit the same was transferred to the other defendant several months after the hiring, is not a sufficient reason for not making them parties, when it is in nowise alleged that they also sold or relinquished their interest in the compensation for the use of the boat before the time of the sale.

When, in the agreement referred to, the hirer agreed to pay all the expenses of running the boat, and keep her in good repair so long as the owners should permit her to remain in the defendants' possession, though it discloses a probable intention to run the boat, does not compel the defendants to do so ; so long as the defendant pays the hire he may run the boat or not at his pleasure.

And an averment that the boat has been greatly damaged, impaired, and deteriorated, and is constantly depreciating in value, by reason of being withdrawn from navigation and laid up at the dock, and from want of care and attention in her safe keeping and preservation, and from the defendants' neglect to keep her in good order and repair, and in a state fit for navigation, is not a proper form of averring a breach of the agreement to keep the boat in repair ; and if it were, it would not warrant the plaintiffs' prayer for relief, viz., a recovery of the value of the boat.

If such a cause of action is to be claimed on the ground that the defendants' acts are tortious, and subject them to the payment of the value of the boat as damages, then there is an improper joinder of causes of action, one in tort, the others in contract.

The defendant to whom the title of the other part owners has been transferred is not liable to the plaintiffs for the time, or for the neglect of the other defendants to repair.

Whether a suit in equity will or will not lie to restrain the owners of a major portion of a vessel from removing her from the state, or whether the jurisdiction of such matters is in admiralty only, it is clear that such a suit cannot be joined with an action on the contract for the hire of the vessel.

(Before HOFFMAN, SLOSSON and WOODRUFF, J.J.)

Heard, April ; decided, June, 1856.

APPEAL, by plaintiffs, from a judgment at Special Term, by Duer, J., sustaining the demurrer to the complaint. The substance of the pleadings is sufficiently stated in the opinion of the court.

P. Y. Cutler, for appellant.

<i>D. B. Eaton</i> , for N. Y. & Erie R. R. Co.,	}	respondents.
<i>Chas. Jones</i> , for Drew,		

BY THE COURT. WOODRUFF, J.—This case comes on, to be heard upon an appeal from the judgment of the Special Term, in favor of the defendants, upon their several demurrers to the complaint.

The complaint, in the first nineteen folios thereof, avers that the plaintiffs, and Cornelius Vanderbilt and James B. Townsend, were, on the 22d day of October, 1853, owners of the steamboat Francis Skiddy, in the proportions following: Coster and Andrews, the plaintiffs, each two-twentieths, Vanderbilt eleven-twentieths, and Townsend five-twentieths, and being such owners, they, on the day aforesaid, entered into an agreement with the defendants, the New York and Erie Railroad Company, by which they let, and delivered to the company, the said boat, and the company hired, and took possession thereof, and agreed to pay all expenses of running the same, and to keep her in good repair, and to pay to the said plaintiffs, Vanderbilt and Townsend, for the use thereof, one hundred dollars per day, "during all such time as the said plaintiffs, Vanderbilt and Townsend, should permit the said boat to be and continue in the possession of the said company, and not withdraw the same from such possession."

That from the date of such agreement until now the said boat has been, and now is, in possession of the company, under such agreement, by the permission of the plaintiffs, and Vanderbilt and Townsend, and has never been withdrawn by them. That the said plaintiffs, and Vanderbilt and Townsend have duly performed, etc.; but that the said company have never paid the said sum of one hundred dollars per day for the use of the said boat. That the said company are liable to pay the amount aforesaid, and that the plaintiffs are each entitled to one-tenth part thereof, and that the company refuse to pay the same or any part thereof.

This is a plain statement of a good and sufficient cause of action, on a special contract, and for the recovery of money which, upon the facts stated, is due to the plaintiffs, and Vanderbilt and Townsend. The contract set forth is single and entire. The agreements, on the part of the company, are to, and with, the plaintiffs, and Vanderbilt and Townsend, jointly, and not severally. There is no intimation that the defendants have undertaken to pay the charter money to the several owners in the proportions of their respective interests in the boat.

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We know of no rule of pleading, nor any principle of law, authorizing the plaintiffs to maintain a separate action for their particular portion of these moneys, without making Vanderbilt and Townsend parties. A joint cause of action, vested in two or more, can not be split into several at the option of those in whom it is vested. The company are not liable to be vexed with two or more separate suits, for the same cause of action, and having, as the case may be, litigated the claim of two of the owners, to be again called upon to litigate the same matters, under the same joint contract, with Vanderbilt, and again with Townsend. The circumstance that the consideration, for the agreement by the company, was the use of a steamboat, or vessel, of which the plaintiffs are part owners, makes no difference. Besides, if there was any warrant for permitting such an agreement to be treated as, in effect, running to each severally, and entitling each to recover the proportion of the charter money which, as between the co-owners, would fall to his share, (which, however, cannot be conceded in this case,) then the plaintiffs themselves, could not join in the action. If their interests are several, and their rights several, their title to the money to be recovered by each respectively, is several, and the causes of action thus assumed to be several can not be joined.

But, in truth, as before observed, the company's agreement is single; it is made with all; the title to recover under it is vested in all; the money due upon the agreement belongs to all, irrespective of the state of the accounts between them and the respective shares into which it may be divisible when recovered, with which the company have nothing to do; and all must unite in the action brought to enforce the agreement, and recover the charter money, unless some facts are stated in the complaint which excuse the plaintiffs from uniting Vanderbilt and Townsend with them as plaintiffs. If that be done, then, notwithstanding the rule be as we have stated it in actions at law, the plaintiffs may unquestionably proceed upon their equitable rights, and, in equity, enforce them and recover the money. But even then, they must make Vanderbilt and Townsend parties to the action, as defendants, unless they also show that Vanderbilt and Townsend have ceased to have any interest in the matters in controversy.

What facts, then, further appear in this complaint which are relied upon as an excuse for not joining them as plaintiffs?

The only further statement in the complaint, affecting Vanderbilt and Townsend in any manner, and, therefore, the only one which bears upon the question above considered is, that afterwards the company, with malicious intent to cheat, etc., etc., "fraudulently purchased from Vanderbilt and Townsend their respective five and eleven-twentieth parts of the said steamboat, in the name of Eli Kelly, but in trust, and for the benefit of, the said company."

Whether this purchase was made with a bad motive or not is quite immaterial; the motive furnishes no ground of appeal to any court unless, nor until, some wrongful act is done, attempted, or threatened, which act it is proper should be either restrained or redressed. The act charged here is a perfectly lawful act, a purchase. The plaintiffs have no cause of complaint in that respect. Vanderbilt and Townsend had a right to sell; the company had a right to buy; and unless the plaintiffs mean that the purchase was a fraud upon Vanderbilt and Townsend, no wrong was done to any one thereby. When Vanderbilt and Townsend come into court, alleging that the purchase was fraudulent, the allegation may be material. This averment of fraud, therefore, has no bearing upon the question whether Vanderbilt and Townsend should be parties to the action. The plaintiffs are not, and could not, upon any facts stated, ask to have the sale set aside, and, if they did, they must make Vanderbilt and Townsend parties, either plaintiff or defendant. The case stands, then, upon the fact averred, that Townsend, on the 14th day of November, 1853, and Vanderbilt, on the 10th of March, 1854, sold to the defendants (who purchased in the name of Eli Kelly) their respective twentieth parts of the said boat; and the plaintiffs claim to recover for, not only the money accrued and payable for the use of the boat since those dates, but, also, from the day the original agreement was made, *i. e.*, for over thirteen thousand dollars accrued before Vanderbilt sold his share of the boat; and there is not an intimation in the complaint that Townsend, for the period in which he continued to be an owner, and Vanderbilt, for the residue of the term, are not jointly interested with the plaintiffs in the recovery of that money. The averment of the sale of the boat does not, therefore,

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constitute any reason for not making Vanderbilt and Townsend parties.

If not made parties plaintiff they should have been made defendants. There is no averment that they refuse to join in the action; there is no averment that they have been guilty of any fraud, or are parties to, or are even cognizant of any fraud done, attempted, or contemplated by the company.

The demurrer for want of these parties was, therefore, properly sustained.

1. In reference to the cause of action now in question, the purchase of the boat by the company, if true as alleged, is undoubtedly a sufficient reason for proceeding by what would formerly have been termed a bill in equity. The union of interest in the company, as owner and hirer, would so embarrass an action at law, that adequate justice could not be done; but all parties interested in the charter money should be before the court.

2. The next cause of action, or combination of facts, upon which the plaintiffs rest a claim to recover, consists in averments that the company, in May, 1854, caused and procured the said sixteen-twentieths of the said boat to be conveyed, by the said Eli Kelly, to the defendant Daniel Drew, (the said Drew fraudulently pretending to be the owner, but being in fact the mere trustee and instrument of the company); and that Drew and the company have fraudulently combined to cheat the plaintiffs, the said company procuring the said Drew to consent, and Drew consenting to withdraw the said boat from navigation; the said Drew taking possession, laying her up at the dock and keeping her unemployed, with the fraudulent design of releasing and discharging the said contract of hiring; and that the said Drew on or about the 19th of May, 1854, as such pretended but fraudulent owner, took possession of the boat, and, without the plaintiff's consent, withdrew her from the navigation in which she had been employed under the agreement of hiring, laid her up at a dock where she has ever since remained unemployed and unused, but in the possession of the company, through and by means of said fraudulent combination and confederacy with Drew; and the plaintiffs then aver that "by reason of being so fraudulently withdrawn from navigation and laid up at dock by the defendants, and from want of care and attention on their part in her safe-

keeping and preservation, and from their neglect to keep her in good order and repair, and in a state fit for navigation, as they ought to have done, the said boat has been greatly damaged, impaired, and deteriorated in value."

The plaintiffs then add, that their shares of the boat were worth fifty thousand dollars before the said purchase by the company and the said withdrawal from navigation, which they charge will be lost by the wrongful acts mentioned, and which they claim to recover in addition to the said hire of the boat from the defendants herein.

The distinct and only cause of action here alleged, is the withdrawal of the boat from navigation, laying her up at the dock, and the damage and deterioration in value arising from that, and from neglect and want of repairs; and this is made the basis of a claim to recover her full value.

Now, if this cause of action is claimed to arise on the contract alleged in the complaint, it is liable to two difficulties. In the first place, no agreement by the company to employ the boat upon the Hudson River or elsewhere is alleged in the complaint; the promise and agreement by the company is to pay all expenses of running the boat, and to keep her in good repair, and to pay \$100 per day for the hire thereof, so long as the owners should permit her to remain in the possession of the company. This undoubtedly discloses an intention to run the boat, and binds the company to pay the expenses, if any, so incurred, but so long as the company retain possession of the boat they must pay the hire whether they run the boat or not, and so long as the company pay the hire they were at liberty to run her or not at their pleasure.

And as respects the agreement to keep the boat in repair, we doubt very much the sufficiency of the averment in that respect. It is not stated in any manner which can be made the subject of a distinct issue, by denial, that the company have not kept the boat in repair. That, and that only, was their agreement, and it is not stated that they have not done so; but the statement is, that the boat "has been greatly damaged, impaired, and deteriorated, and is constantly depreciating in value, by reason of being so fraudulently withdrawn from navigation and laid up at dock by the defendants, and from want of care and attention on their part

in her safe-keeping and preservation, and from their neglect to keep her in good order and repair, and in a state fit for navigation." A denial of this averment would, it is true, form an issue upon the fact of damage and deterioration from the combination of causes stated; but it would not be adopted to put in issue what, if it is claimed, should be averred as a fact, viz., that the company have not kept the boat in repair.

Besides, these facts do not warrant the relief prayed. If this cause of action is to be regarded as arising under the contract set forth in the complaint, the defendant Drew is not liable upon this cause of action at all; he has never contracted with the plaintiffs, and by virtue of the agreement in the complaint, he is not liable to damages; nor does the averment that the boat is constantly depreciating in value, and that the plaintiffs apprehend that her value will be wholly lost to them, warrant any recovery of her value as such. If the plaintiffs recover upon the contract they recover the damages actually sustained by a breach thereof, not the value of the boat, as such, nor damages which they apprehend will in the future be sustained. And it is, moreover, at least doubtful, so long as the company retain the possession of the boat and pay, or are called upon to pay the hire, (and both of these are alleged and insisted upon by the plaintiffs,) whether an action will lie on the agreement for not keeping the boat in repair, or if in form it may possibly be sustained, whether any more than nominal damages can be awarded; it is, however, not necessary to pursue that inquiry.

The only ground upon which Drew can be charged upon this cause of action, (if at all,) and the only ground upon which the company can be charged with him for the value of the boat, is that their fraudulent acts are tortious and tend to the destruction of the property, or amount to a conversion of the property to their own use. This was not insisted upon by the plaintiffs' counsel on the argument, and we apprehend it cannot be successfully insisted upon, see *Moody v. Breck*, (1 Sandf. 304, and cases there cited); and if it could, then the complaint is bad, because it attempts to join such a cause of action with a cause of action arising upon contract only.

3d. The remaining cause of action, or ground for relief, consists in averments that the plaintiffs are citizens of this state, residing

in the city of New York, and the boat an American vessel, and that for the purpose of defrauding the plaintiffs, etc., the defendants threaten to remove the said boat from the state of New York, and from the United States, to Canada, and there to sell her, or the interest of the defendants therein, to British subjects and keep her permanently beyond the jurisdiction of the courts of this state and of the United States, and that if the defendants should carry such threats into execution, the rights and interests of the plaintiffs in the vessel would become worthless.

Viewing this action as founded upon contract only, there is nothing in this averment calling for the interposition of the court, as a court of equity, in aid of the recovery of the money claimed; the relief prayed for, so far as it rests upon these last averments, is an injunction. If it be conceded that, upon the facts alleged, the plaintiffs would be entitled to come into this court, as a court of equity, and seek and have an injunction to prevent the removal of the boat beyond the jurisdiction of the state, there would be no propriety in inviting an inquiry into the right and power of the owners of a major part of the vessel to manage and control the same: with the claim to recover for the use of the boat. The act threatened does not render nor tend to render the judgment, which the plaintiffs seek for the hire of the boat, ineffectual, nor is there any thing stated showing it to be at all doubtful that the company are able to pay, and will pay, whatever they may be adjudged to pay.

So far as this part of the complaint proceeds upon the idea that, as part owners, the plaintiffs may come into a court of equity to restrain other part owners in the management or control of the vessel, it cannot be united with the action on a special contract for the hire thereof. I know of no rule of law or equity forbidding part owners selling their own interest in the vessel to any persons they may see fit, whether citizens or foreigners. But whether this court should, as a court of equity, take jurisdiction of the matter of the control and use of the vessel, or whether admiralty has exclusive, as it manifestly has appropriate jurisdiction, on that subject, we do not find it necessary to say, since we are of opinion that a ground of jurisdiction of this sort between part owners, as such, is not properly joined with an action on the agreement set forth in the complaint for the hire of the vessel, to recover the money due therefor.

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Although we think that the relief sought cannot be had against the defendant Drew, as prayed, we do not think he is an improper party to the suit.

The plaintiffs pray that both defendants be adjudged and decreed to pay the whole sum due for the hire of the boat. The defendant Drew is in no degree whatever interested in, and still less liable for any of the charter money accrued before the title to sixteen-twentieths of the boat was transferred to him; and as to what has since accrued he is no more liable, for if he is owner in fact, and has done nothing to discharge the company from their obligation to pay, he, instead of paying, will be entitled to receive from the company a very large sum; but if the facts be as alleged and he only holds for the benefit of the company, still he has never agreed to pay to the defendants the hire of the boat. It is not alleged that he has collected it, or any part of it, and is liable to account to the other part owners therefor. A liability to such an accounting, and an action therefor, could not be joined with an action against the company for the hire unpaid, since in that accounting the company would have no interest.

I have already suggested that he is no more liable on the agreement for a neglect to repair; he has not agreed to repair, and a proceeding to recover damages against him, as part owner in possession, for neglect or carelessness, if it could be sustained, could not be joined with the action on the present agreement.

Still, in respect to the matter of the money due for the use of the boat, I apprehend that holding the legal title to sixteen-twentieths thereof, he is not an improper party, though it may be that if all the facts stated in the complaint be taken to be true and those sixteen-twentieths belong to the company, Drew would be a formal party only and it might not be erroneous not to join him.

Our conclusion is, that the demurrer, for the reasons stated above, was properly sustained, and that the judgment thereon should be affirmed. Doubtless leave would have been given to amend, if it had been desired by the plaintiffs.

Judgment affirmed, with costs.

ALFRED PEABODY, EDWARD P. FLINT, and GEORGE H. KELLOGG v. ASAHEL BEACH, ELISHA BLOOMER, FREDERICK HADLEY, and RALPH HILL.

In an action against two or more, as joint debtors for money lent, one of the defendants cannot defeat the action by setting up, by way of set-off or counter-claim, a claim to damages in his own favor individually against the plaintiffs for fraud and failure, and neglect to perform their duty to him as his agents under a power of attorney authorizing them to attend to his private business, to manage the same for his benefit.

(Before HOFFMAN, SLOSSON and WOODRUFF, J.J.)

Heard, April; decided, June, 1856.

APPEAL from a judgment by Mr. Justice Hoffman at Special Term, sustaining a demurrer to a counter-claim.

The action was brought by the plaintiffs against all the defendants on a joint contract made by them to the firm of Flint, Peabody & Co., composed of the plaintiffs and one James P. Flint, who, prior to the commencement of the action, had released all his interest to plaintiffs.

The defendant, Elisha Bloomer, answered severally, that he had appointed the plaintiffs and the said Flint to attend to his, Bloomer's, interest in the management of the sale of a certain machine belonging to him, that the plaintiffs and Flint accepted the agency, and that they combined to defraud Bloomer, by suffering the machine to be sold in violation of that duty as his agents, and to his damage of \$5,000. To this portion of the answer the plaintiffs demurred, and judgment upon the demurrer was rendered at Special Term in their favor.

Moody, for the defendant; Bloomer, appellant.

This action, being upon contract, it was competent for Bloomer to set up a counter-claim, arising also upon contract in his favor against all the plaintiffs. *Parsons v. Nash*, (6 Howard, 454.) The 150th section of the Code clearly indicates that there may be cases in which the counter-claim may not be due to, or in favor of, all the defendants, and a counter-claim, under the Code, has a broader

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signification and more extended application than the old statute of set offs, *Lindsay v. Jackson*, (2 Paige, 587,) *Gleeson v. Moon*, (2 Duer, 462.) There is no good reason why Bloomer should not be allowed to apply his demand in extinguishing the claim of the plaintiffs against all the defendants; had he paid the demand in cash, and the plaintiffs had brought their suit for their claim, he clearly might have set up the payment in bar, and that plea, under the Code, would have been a counter-claim as much so as that set up in this action.

The judgment on the demurrer should, therefore, be reversed, and judgment rendered for the defendant.

De Forrest, for the plaintiffs.

The facts alleged in that portion of the answer which is demurred to might, if proved, sustain a separate action for damages by Bloomer alone against the firm of Flint, Peabody & Co., consisting of the plaintiffs and James P. Flint, but they cannot be availed of in the present action by way of counter-claim.

1. The defendant's claim is against the plaintiffs and James P. Flint jointly. If the damages counter-claimed were made the ground of an original action by Bloomer as plaintiff, it would be necessary for him to unite Flint as a co-defendant with the other partners of Flint, Peabody & Co.

2. If it should be said that Bloomer does not claim damages upon a contract between him and Flint, Peabody & Co., but upon an alleged tort, then the counter-claim is unauthorized, because the complaint is on a contract alone.

3. The proposed counter-claim, if permitted, can be available to Bloomer alone, and not to his co-defendants. A several judgment could not be had in this action between the plaintiffs and Bloomer severally.

4. The obstacle in the way of the counter-claim last referred to is not relieved by § 150, nor by § 154 of the Code of Procedure.

5. Nor can the matters averred, for the reasons already stated, be availed by way of set-off, or rather defence, and for this I cite the following authorities, 3 Johnson Chanc. Rep., 574; *id.*, 351; Collyer on Partnership, 761. I, therefore, claim that the judgment appealed from be affirmed, with costs.

BY THE COURT. WOODRUFF, J.—This action is brought to recover moneys alleged to be due to the plaintiffs in their own right, and as assignees of their copartner Flint, from the defendants, as joint debtors, for money lent and advanced to the defendants, and paid, laid out, and expended for their use as copartners.

The defendant Bloomer, answering separately, among other defences sets up a set-off, or counter-claim, in his own favor individually, for damages sustained by himself, by reason of the plaintiff and the said Flint's fraud and negligence, in this, that he appointed the plaintiffs and the said Flint his agents, under a power of attorney, to manage and attend to his interests in California, which power of attorney he avers the plaintiffs and the said Flint received and undertook to perform, keep, and execute the trusts, duties, and obligations thereby given, conferred and imposed. By the fraudulent violation of their duty in this respect, the defendant avers that he has sustained damages, which he insists upon as a set-off or counter-claim in this action.

We fully agree to the conclusion at which Mr. Justice Hoffman arrived in the examination of the demurrer to this defence, at the Special Term, that to an action against several joint debtors, for a debt due by them as copartners, one of them cannot avail himself either by way of set-off or counter-claim of such a defence. If the defence have any foundation, as very imperfectly, (we think), exhibited in the answer, it belongs to Bloomer alone.

If it can be regarded, under the averments in the answer, as arising upon contract, then it is a fatal defect that there is no mutuality between the two claims which are exhibited. If it be deemed a tort set up in the answer, then it is not so connected with the subject of the action that it constitutes any ground of recoupment. And in no aspect is the defence such that in this action there can be a separate judgment against the defendants, who are jointly liable, and who do not and could not set up the defence upon which the defendant Bloomer relies. The case of *Parsons v. Nash*, (8 How. 454,) instead of sustaining such a counter-claim, appears to us to tend to the contrary.

When one of several joint debtors pays the debt, that is payment for all, and any or all of them may set up the payment in bar. Here there is no pretence that either of the other defendants could have done so.

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But, without pursuing the subject, it must suffice to say, that the elaborate opinion pronounced at Special Term by Mr. Justice Hoffman, appears to us to be entirely sound in its conclusion, and it is unnecessary to enlarge upon the subject here.

The judgment appealed from must be affirmed, with costs.

FREDERICK V. D. HORTON v. HENRY T. MORGAN.

A, residing in the country, employed a stock broker, in New York, to make purchases of stock on his account; and for that purpose deposited with him \$3,600. He afterwards directed him to take "Parker Vein stock," at a certain rate, adding, "Whatever excess it may cost, over and above my deposit in your hands, I shall very probably be glad to have you carry till sold again, if you raise no objection." The defendant purchased 200 shares of such stock, and the excess of the cost was \$349.76. The purchases were made and paid for by the 5th of September, 1853. Transfers were made to the defendant, and ultimately to his clerk, with full powers to him, so as to retain the control. No certificates were taken out at the time.

Between September, 1853, and June, 1854, the plaintiff had dealings in other stocks, with the defendant as his broker, and, in several letters, recognized the Parker Vein stock as in his hands, and did not demand a transfer to himself, or direct a sale, nor proffer the balance due on the purchase.

The defendant had at all times, within the period mentioned, more than sufficient stock in his own name, or the name of his clerks, and under his control, to respond for the 200 shares.

In June, 1854, the company having exploded, certificates were taken out, dated the 18th and 20th of May, 1854. On the 13th of June, 1854, the account current was sent, and the plaintiff paid the balance of \$349.76. On the 17th of June, in consequence of the plaintiff's request, the certificate being in the name of the clerk, with regular powers of attorney from him, were transmitted to the plaintiff, who refused to receive the same, and brought his action for the amount of \$3,600 deposited, and the balance of \$349.76 paid.

Held, That the defendant had a right to deal with this stock as he chose, he being always ready and able to transfer an equal number of shares. That he was not bound to take out certificates in his own, or the plaintiff's name, and to identify and retain them. That the transaction was a speculation, for buying and selling the stocks, and not of the nature of a regular deposit of stock, as security upon a loan, for a definite period.

Seemle, That evidence of the usage of brokers, in a case like the present, is admissible.

(Before OAKLEY, Ch. J., HOFFMAN, and SLOSSON, J.J.)

Heard, May; decided, June, 1856.

THE action was brought to recover the sum of \$3,600, and also the sum of \$349.76, alleged to be due from the defendant to the plaintiff. The complaint states, as the causes of action, that the plaintiff, about the 8th of August, 1853, had loaned to the defendant the sum of \$3,600, to be repaid on demand, with interest at 6 per cent.; that a demand had been made, and refused. Next, that, about the 13th of June, 1854, the defendant represented to the plaintiff that he had purchased, on his account, two hundred shares of Parker Vein Company stock, and that there was a balance due from the plaintiff of \$349.76; whereupon, the plaintiff, relying upon the truth of such statements, paid such alleged balance on the 15th of June, 1853; that the defendant had not purchased such shares, or any number of shares of such company, nor was any balance due him on account of any such purchase; that he had demanded repayment of the said sum of \$349.76, which had been refused. Judgment is then prayed, for the aggregate amount of \$3949.76, with interest as specified.

The cause was tried before Campbell, J., and a jury; and after the testimony on both sides had been closed, the complaint was dismissed, and the plaintiff duly excepted. Liberty was given to the plaintiff to be heard, in the first instance, at the General Term, upon a bill of exceptions, which has accordingly been made.

All the material facts are stated in the opinion of the court.

Nash, for the plaintiff.

Marbury, for the defendant.

BY THE COURT. HOFFMAN, J.—Prior to the 11th of August, 1852, the plaintiff had deposited with the defendant the sum of \$3,600, for the purpose of investing the same in stocks.

On that day the plaintiff wrote to the defendant, instructing him that when he could buy Erie R. R. shares at 70 or 71, he would be glad to have him take all he was willing to carry, with the "margin" left in his hands by R. Talcott, for his (plaintiff's) account, say \$3,600.

This was answered on the 13th of August, suggesting some objections to the purchase, on the terms and prices named.

On the 26th of August, the plaintiff wrote that the news re-

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ceived here (Skaneateles) did not seem to promise very well for Parker Vein at $17\frac{1}{2}$. If you in Wall street feel impressed the same way, I shall be glad to have you take two hundred shares Parker Vein for me at once, at the lowest market offered.

August 27th, the defendant replied, that he thought it best to hold back; that Parker Vein was up to $18\frac{1}{2}$ a $18\frac{1}{2}$.

On the 2d of September, the plaintiff writes, that he was still inclined to take Parker Vein at the lowest market offered; if it can be taken below cash figure by giving seller option of ten or fifteen days, would do so. "Whatever excess it may cost over and above my deposit in your hands, I shall very probably be glad to have you carry till sold again, if you raise no objection."

The defendant answered on the 3d of September, that the favor of the 2d was received, and he bought for him 100 Parker Vein $19\frac{1}{2}$, of Clerke & Co., and 50 Parker Vein $19\frac{1}{2}$ of H. R. Parker. That he should probably get the other 50 on Monday.

On the 5th of September (Monday), he writes that he had bought 50 Parker at $19\frac{1}{2}$, making 200 shares, for which I charge you at $19\frac{1}{2}$, \$3,900, brokerage \$50, \$3950.

In a letter of the 28th of September, the plaintiff says: If you will consider my Parker Vein stock in your hands sufficient margin, I shall be glad to have you take for me 150 or 200 shares of Cumberland Coal, buyer 60 days."

On the 29th of September the defendant replied that he had bought 100 Cumberland at $38\frac{1}{2}$, buyer 60 days, and would close up the other 100 to-morrow. On the 30th he writes, that in consequence of bad news, he had deferred purchasing the balance of Cumberland. By a letter of the 1st of October, the plaintiff leaves this purchase to the discretion of the defendant; and by another of the 4th of October, he informs the plaintiff that he had done nothing further for him, as money was stringent, and stocks could not go up.

On the 23d of November, the plaintiff proposes an arrangement to the defendant for the latter's carrying his stocks, and speaks of his 60 days (on Cumberland purchase) as being nearly expired. The defendant, on the 25th of November, declines the arrangement, and states, that the 100 Cumberland will be due on Monday, "when I am to sell it at current rates as I understand." On the 28th of November, he apprises the plaintiff of a sale of

the 100 Cumberland, and incloses an account showing a balance due him of \$413.50 on this transaction, which the plaintiff remits on the 2d of December, and in his letter of that date, says: "Can you advise me with regard to Parker Vein; is there any probability of its ever being worth what it cost me?" In reply, the defendant, under date of the 3d of December, says: "There appears to be a general impression that Parker Vein has little intrinsic merit. . . It is one of those uncertain fancies that may take a sudden turn upward one of these days."

The testimony is explicit that the several purchases of Parker Vein stock were actually made, and paid for by the defendant, and transfers were made to him in the books of the company. It is also in evidence that the stocks held by defendant for others, and among them these parcels of Parker Vein were transferred by him to clerks, who gave him a power of attorney to cover them, and always treated them as belonging to him and under his control. It is also proven that the lowest number of shares which stood in the names of the two clerks, and of the defendant from the 4th of September, 1853, to the closing of the books, was 240 shares. Usually the amount was much greater. There was no time when the defendant could not have transferred to the plaintiff 200 shares of such stock.

On the 13th of June, 1854, the defendant enclosed his account current as to the Parker Vein stock and the Cumberland stock, to the plaintiff, showing a balance due of \$349.76. The account as to the Parker Vein alone shows a balance of \$349.81. On the 15th of June, the plaintiff remits that balance, and asks that his certificates of the stock be sent to him. On the 17th of June, the defendant enclosed two certificates for 100 shares, each Nos. 4080 and 4103, given to D. H. Westerfield, one of the clerks before-mentioned, with a regular power of attorney in favor of the plaintiff attached to each. The certificates were dated May 18th and 20th, 1854.

On the 19th of July, 1854, the plaintiff apprises the defendant that he considered the certificates of May, 1854, as not representing his stock which should have been standing in his name in September, 1853. The defendant answers on the 20th of July, that the stock was bought for him, and paid for on the 5th and 6th of September, and transferred to him; that as he had not paid

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in full, I held the stock in my name, or, rather, that of my clerk, and he held it along with stock bought for other customers without taking certificates.

The plaintiff, on the 28th of July, 1854, writes that he returns the certificates, and states the position he has taken, which is the ground of the present suit. He insists, that he was entitled to a legal title to 200 shares of the stock vested in him at the time, and evidenced by certificates then legally issued to him.

The testimony also establishes a custom among brokers, that when they are requested to convey stock bought by them for customers, if the stock is not paid for, they deal with it as they think proper, and respond in an equal amount when called upon. If it is paid for, they keep it on hand in their own name, or under their control. If there was a deposit, it would depend how close the amount came to the price, whether they would do with it as they pleased, or hold it specifically. There was no fixed rule.

From this statement of the facts of the case, it is apparent that the plaintiff had no intention, in purchasing the stock in question, of making an investment and becoming a stockholder. It was a naked stock speculation upon the chance of profit by a rise of the market. He has characterized it himself in his letter of the 23d of November, 1853, stating that "his gambling so far had not been productive of very good results." With notice given on the 5th of September of the purchase on his account of the two hundred shares and the prices, he treats them on the 28th of September as property in the defendant's hands, telling him that if he considered the stock a sufficient margin, to purchase Cumberland Coal stock for him. On the 2d of December, 1853, he asks for advice as to its disposition; and thus he allows it to rest until June, 1854, when the explosion of the company, and the transmission of the certificates open to his view the scheme of saving himself at the expense of his agent.

Under such circumstances, it appears to us that the plaintiff placed himself under the law and custom of brokers, and was chargeable with knowledge of what that usage was, and intended to be bound by it. Indeed, his familiarity with the language of the profession warrants the belief that he actually knew it. It would be gross injustice to allow him now to reject it.

Unless, then, the decided cases expressly require a different con-

clusion, we cannot hesitate in denying to the plaintiff the relief he seeks.

The case of *Nourse v. Prime* (4 John. Ch. Rep. 490; 7 id. 69) appears to us so applicable to the present, that it must determine it, unless it has been impaired as an authority by other cases. The shares had been transferred to the defendants, and were then agreed to be held as collateral security, and were mingled with the other stock of the defendants, without certificates taken out; at all times they had in their names an amount equal to those deposited. The case of *Allen v. Dykers*, (3 Hill, 593, and 7 Hill, 497,) in fact affirms the principle of *Nourse v. Prime*. The stock was pledged under an express agreement, contained in the stock note, to sell the same in case the note was not paid at maturity. There was no right to sell before. The amount was two hundred and fifty shares. It was carried to the broker's name on the books, where it stood in common with other stock of his. He transferred all that he had, except seventy-two shares, before the note matured; and afterwards sold the seventy-two shares at a much less price, and applied the proceeds on the note. It was held, that he was responsible for the highest price at which he had sold stock during the running of the note for all the shares except the seventy-two, and his sale of these was ratified. Thus, they were held to be the shares of the plaintiff, although wholly undistinguished, and were so held upon the doctrine of *Nourse v. Prime*.

The court expressly distinguish the case before it on the ground that, in *Nourse v. Prime*, the party had, at all times, sufficient stock under his control to enable him to replace the deposited shares.

With respect to the question of the admissibility of evidence as to the custom of brokers, as to which an exception was taken at the trial, in *Allen v. Dykers* it was ruled out expressly on the ground that it would be in direct contradiction to the fair and legal import of a written contract. But the Chief-Justice says, "it may not be necessary to determine what effect would be due to such proof, in the case of a simple pledge as collateral security, without any further agreement. Possibly the known usage, in like cases, might be considered as attaching itself to the transaction, and constituting a part of it."

In the court of errors (7 Hill, 497) the expressions of Chancellor

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Walworth and of Senator Wright, although somewhat more general, place the inadmissibility of the evidence on substantially the same ground: it would contradict the written agreement. Perhaps they meant to be understood, that the usage should not be allowed to control the general law in the case of a mere pledge as security, without an agreement. But this may properly be limited to such a case as the one before them, where there was a loan to be repaid in a definite period and security deposited.

It is not essential whether this evidence is admissible or not, although our impressions are it was so. The case can be decided against the plaintiff without such evidence. There was nothing in the relation of the parties requiring that certificates should be taken out identifying the stock, and retained, subject to the plaintiff's order, upon his paying the balance. The defendants were only bound to have enough of the stock on hand to make an immediate transfer, on demand. There was no such agreement as in *Allen v. Dykers*, making the right to sell dependent upon the failure to pay; or which, in the language of Senator Wright, "expressly prohibited the sale of the stock before the time limited for payment of the money." The whole object and intention was, that the defendant should purchase the stock, should hold it, and should sell it. A transfer to the plaintiff was not, then, contemplated.

It has been urged, that without the taking of certificates, and their identification, the plaintiff would have been subject to the loss of his stock; in case of death or bankruptcy, it would have gone into the general mass of his estate.

It might be sufficient to say, that he assumed this risk when he entered into the transaction; but, in the case as presented, it would not exist. There being stock enough held by the defendant to answer this, and all similar demands, there can be little doubt that it would be selected from the mass of the estate, and appropriated to the use of those for whose account, and with whose funds, it had been purchased.

We consider that the dismissal of the complaint was right, and judgment must be entered accordingly.

SYLVANUS B. STILWELL and NATHANIEL MONTROSS v. JOHN N. STAPLES.

A lot of cloth was delivered to the plaintiffs by the defendant to be manufactured into clothing. While in their possession it was destroyed by fire. The plaintiffs were insured to the amount of \$27,500. Their own stock exceeded that amount considerably, and they recovered the sum of \$27,000 on the policies. The goods of the defendant destroyed were of the value of \$885. The policies contained the following clause: "The ——— Insurance Company doth hereby insure Stilwell and Montross against loss or damage by fire to the amount of \$——, on their stock of ready-made clothing, and other hazardous merchandise the property of the insured, or held by them in trust or on commission, or sold but not delivered, contained in the building No. 112 Fulton-street, in the city of New York." The action was to recover the amount for making and trimming the cloth.

By another clause, the property held in "trust or on commission, must be insured as such, otherwise the policy will not cover such property."

Held, that the goods of the defendant were goods held in trust by the plaintiffs for his use; that they were covered by the policy; that the phrase embraced and designated goods, the possession and custody of which was in the party effecting the insurance, and the actual ownership in the party, (the defendant here), who had delivered them, and that the defendant was entitled to offset his proportion of the insurance money against the plaintiffs' demand for manufacturing the cloth.

The words in the policy were sufficient to cover the defendant's goods; it was a just presumption that they were used to protect goods so situated; and hence the burden was on the plaintiffs, the factors, to show that they employed them in a restricted sense, as goods for which orders to insure had been received.

(Before OAKLEY, CH. J., HOFFMAN and SLOSSON, J.J.)

Heard, May; decided, June, 1856.

CASE upon a verdict taken for the plaintiffs for the sum of \$832.97, subject to the opinion of the court at General Term, and to be heard there in the first instance as to the defendant's claim of set-off, with liberty to the court to ascertain by reference the amount of such claim if allowed; and also, with liberty to modify the verdict, and to give judgment for the defendant, if entitled thereto, by reason of the set-off. The following are the material facts as established by the evidence on the trial:—

The defendant in December, 1851, delivered to the plaintiffs a lot of goods of the value of \$2,700 or \$2,800, to be made into

clothing. The plaintiffs manufactured and delivered a part of this lot, the making and trimming of which amounted to \$656.76. The defendant, on the 29th of March, 1852, paid the plaintiffs \$1,000 on account. The balance of the lot of goods sent to the plaintiffs, of the value of \$885.14, was, while in their possession, and on the 23d of January, 1852, destroyed by fire. The plaintiffs were insured against loss by fire to the amount of \$27,500; and their own stock, which was destroyed, and covered by the policies, was, according to their own estimate, of the value of \$34,585.41; and it was admitted that they received within sixty days after the fire, of various insurance companies, the sum of \$27,000. The policies of insurance on which the plaintiffs received that sum, were upon "their stock of ready-made clothing, and other hazardous merchandise, the property of the insured, or held by them in trust or on commission, or sold but not delivered, contained in the building, No. 112 Fulton-street, in the city of New York." The policies were dated in May, 1851. The action is for the balance of the bill for making and trimmings, viz., \$656.76.

It was proved that the plaintiffs had at the time of the fire, no other goods in the store than those of the defendant and their own. It was also proven that the goods of the plaintiffs which were burnt had not been manufactured. The policies in this case have also the following clause among the conditions: "Property held in trust or on commission must be insured as such, otherwise the policy will not cover such property; and in case of loss the names of the respective owners shall be set forth in the preliminary proofs of such loss, together with their respective interests therein. Goods on storage must be separately and specifically insured."

There was also a clause in the body of the policy, "that the loss or damage by fire was to be estimated according to the true and actual cash value of the said property at the time the same shall happen." It is contended by the defendant that his goods were embraced within the policies, and that, inasmuch as the money paid by the insurance companies was paid, as much on his goods as on those of the plaintiffs', they cannot separate and apply it exclusively to themselves; and that the plaintiffs should allow him a *pro rata* share of the amount so received. This is set up

specifically among the defences in the answer, as a counter-claim and set-off to the plaintiffs' demand. The court refusing to submit the case to the jury, a verdict was taken by consent for the plaintiffs for the sum of \$832.97, the balance of their account and interest, subject to the opinion of the court, with liberty to ascertain by reference, (if the defendant were entitled to a set-off), the proper amount, and to modify the verdict and give judgment for the defendant.

The other material facts are stated in the opinion of the court.

D. D. Field, for the plaintiffs.

C. B. Smith, for defendants.

BY THE COURT. HOFFMAN, J.—The plaintiffs were manufacturers of cloths. It was part of their business to receive cloths from others, make them up into wearing apparel, supply the trimmings, and transmit them to the owners. They had received goods of the defendant for this purpose to a large amount. The right of property was undoubtedly in the defendant as owner, subject to a lien for the labor and expenditure of the plaintiffs. The answer and reply sufficiently show the ownership. By the policies taken out, the plaintiffs insure their stock of ready-made clothing, and other hazardous merchandise contained in the building No. 112 Fulton-street. And they insure goods specified as of four classes: 1st, goods their own property; 2d, goods held on commission; 3d, those sold but not delivered, where, for example, by the sale the right of property would be transferred; and 4th, goods held by them in trust. The question is, whether we can consider these words to have been used in such a sense as will cover goods in the situation of those of the defendants?

1st. The business of the plaintiffs was that of dealers in cloth, and manufacturers of it into ready-made apparel. They manufactured their own cloth, and the cloth of others, thereby adding trimmings as well as labor. They also, it is alleged, sold on commission cloths, manufactured or otherwise.

The goods in question were part of a quantity of cloths received before the fire, and were on hand at the time of the fire, not manufactured. They were the property of the defendant,

with a lien for any expenses of storage or otherwise which the plaintiffs had incurred.

It is an admitted rule, that an insurance may be effected so as to protect an interest undefined, and an interest of parties not designated, or unknown.

In *Finney v. Bedford Commercial Insurance Co.* (8 Metcalf, 348) this rule was recognized; but it was held that there must be words used in the policy sufficient to cover the interest unknown, or of persons unknown to the assurers. The appropriate form of the policy in such a case is, "for himself and other owners," or, "for whom it may concern," or other words indicating that the insurance is to embrace an interest beyond that of the party in whose name the policy is issued. Such words, or equivalent ones, being introduced into the policy, the rules of law then authorize extrinsic evidence as to the persons who are parties in interest, and who may enforce their claims upon such policy though not particularly named therein.

In *Forest v. The Fulton Ins. Co.*, (1 Hall Rep. 84), Justice Oakley says, that the words in a fire policy, "held in trust or on commission," are equivalent to the words "for whom it might concern," in a marine insurance. See, further, 2 Duer on Insurance, § 21.

There is one proposition, the truth of which, if established, will go far to settle the case in favor of the defendant. Suppose that, at the time of the fire, there had been no goods in the store but those of the defendant, would not the plaintiffs have been entitled to recover the amount of their loss? If they would have been so entitled, must they not necessarily have recovered the amount for the use of the defendant, deducting their own claim for work or charges?

It seems to me the first proposition, and of course the last, must be answered in the affirmative.

I do not propose to examine any other case to prove this than that of *De Forest v. The Fulton Fire Ins. Co.* (1 Hall's Sup. Court Rep. 84.) I have not found that the principle of this case has ever been shaken. The action was there against the company, by the party in whose name the policy was made.

In the first place, every clause which is material in the present policy is contained, in almost the identical language, in that in

the case referred to. The clause as to goods, "the property of the assured, or held in trust by them, or on commission," was identical. A clause in the latter case was, "goods held in trust, or on commission, are to be declared as such;" in the present case it is, "property held in trust, or on commission, must be insured as such; otherwise it will not be covered by the policy."

Next, at the trial under the direction of the court, three schedules of property were made out; one showing the property absolutely owned by the plaintiffs, in the store, at the time of the fire; another showing the goods insured by express orders of the owners; and a third of the goods held by the plaintiffs, for sale on commission, and for which no orders had been received to insure.

The counsel of the defendant admitted a right of recovery for all the goods, the absolute property of the plaintiffs, and those for which insurance had been ordered. They allowed a right to recover, also, upon the other goods, to the extent of the plaintiffs' liens, but denied a right to recover for any value beyond that amount, that is, the value of the goods to the consignor.

The court decided that the plaintiffs could recover this value.

The case involves these points: 1st. An insurance, in a running policy against fire, is available for any goods in the store insured at the time of the fire, even if none, or more, or less, or different goods were in it, at the date of the policy. No one will contest the truth of this proposition, in the absence of different express stipulations.

2d. That as it is not essential to have had the goods specified, so it is immaterial to have the owners designated. Whatever goods were in the store on consignment, at the time of the loss, were covered, to whomsoever they belonged; and the successive owners of such goods were respectively covered, while they were in the store, although not one of them was known or named. I apprehend that this proposition, also, may be abundantly proved by other cases.

3d. The consignees for sale had a right and power to insure, without orders from the principal for what was his interest in those goods, beyond their own interest for advances and charges.

And lastly, that the fact of a policy covering, in terms, goods held on consignment, and that, at the time of the loss, some goods were so held, enabled the consignees to recover their whole value

in their own action. And I deduce, from a careful study of this case, that the decision was reached without any dependence upon the usage to insure in New York, which the jury found, and that it would have been precisely the same if not a word of evidence as to such usage had been given. Justice Oakley expressly says, "that in the view he had taken of the case, the usage found by the jury had no material bearing upon it."

Again, the case is decisive of the present as to the third clause of this policy. The third clause of that policy was exactly the same in meaning. It was fulfilled by the general language in the body of the instrument, "goods, as well the property of the assured, as held by them in trust or on commission."

The language of Mr. Justice Oakley is, "the whole tenor of the policies shows that all goods covered by them were considered to the same extent, and, for all the purposes of the insurance, as the property of the assured."

When I closely apply this decision to the present case I confess my inability to distinguish them. The goods here were in the possession of the plaintiffs, with a qualified interest in them up to the amount of any charges respecting them. Beyond this the entire ownership was in the defendants. In the case of *De Forest* the goods were in the possession of the consignees, with a qualified interest in them for advances and charges, and then an entire interest in others. The goods there were covered for an interest in others in which the nominal insured had not the slightest participation; the goods here are exactly in the same position. The goods there were comprised in the policy, though unknown and without specification, and though the owners were unknown and unnamed, their interest was represented by the nominal assured; the interest of owners of goods held in trust in the present case is also thus represented.

Upon the proposition now discussed, there would then remain one single point to be determined to render *De Forest v. The Fulton Company* perfectly applicable and decisive. It is, have we a right to say, that goods in the store of the plaintiffs, and held or possessed by them under the circumstances in which the defendant was possessed, were goods held in trust within the sense of the policy? It is to be admitted that the defendant here is to sustain the affirmative of this proposition.

The sense which a legal mind attributes to the term trustee and trust estate, in connection with real property, is forced and unnatural, when applied to parties in their present relative position in this suit. To suppose that a merchant, when he speaks of goods held in trust by him, means that he has the absolute legal title, and some one else an absolute right to the interest, profits, or avails, seems to me simply preposterous. Much the most natural meaning is, that he refers to goods of which he has the possession or control, and some one else the ownership. But such a meaning, and its application to particular cases, would much depend upon the nature of the merchant's business.

We may not discard these terms from the policy. We have a right to assume that the parties intended something by using them. What was it that they intended? It was not to cover goods consigned to them for sale; it was not goods their own property previous to a sale, but sold and not yet delivered; and it was not goods their own absolute unqualified property. They intended to cover goods held in trust; and goods held in trust did not fall within either of these classes. What goods, then, were held in trust by them at the date of the policy, at the time of the loss, and through the intermediate period?

The case of *Siter v. Morse* (1 Harris, 218) is expressly in point. The action was to recover a proportionate amount of a loss recovered from one insurance company. The policy was on \$10,000, upon merchandise generally, and without exception, their own or held in trust, or on consignment, contained in the brick building, &c.

The defendants received goods in boxes, said to contain furniture, apparel, and books; and, at the time of the fire, held these on deposit, subject to the plaintiff's order, and had in the warehouse other merchandise, their own and on consignment, to the value of \$12,026.25.

The action for a proportionate amount, \$1000, was sustained.

Stroud, J., said "the expression 'held in trust,' to say nothing of the broad term, 'on consignment,' seems to me to comprehend and protect the plaintiff's goods." He quotes the definition of a bailment by Sir William Jones and Justice Story, and holds that it was goods in the possession of the plaintiffs at the time of the

fire. That the trustee may insure and recover the amount, for the benefit of the party really interested, has long since ceased to be an open question. *De Forest v. The Fulton Insurance Company* is cited and relied upon. Why, having provided for their own property, and property held on consignment, was that held in trust mentioned? What else does it mean in this connection but property, the custody and possession of which was in themselves, but the actual ownership in others?

This opinion was adopted by the court above. *Watkins v. Devana*, (1 Porter, Alabama Rep. 251), was in some respects similar. The owner of goods placed in defendants' store, to be sold at auction, had a right to adopt the insurance against the underwriters, and no less against the trustee or agent who received the money, and this after the loss. It is true the agent had inserted the goods in his schedule rendered to the insurers.

It remains but to add, that the defendants in this case were warranted in adopting the insurance as made on their own account, even after the loss. Mr. Duer has collected the authorities both foreign, English, and American, (2 Duer on Insurance, § 24.) The rule was expressly recognized in the late case of *Mittenberger v. Beam*, (9 How. 198.)

The words then being clearly sufficient to cover the defendant's goods, it being a just presumption of law, that they were used by the plaintiffs and inserted in the policy to cover goods so situated, the burden was on the plaintiffs to show that they did employ them in a restricted sense; as, for example, only to cover goods held in trust for which orders to insure had been received. *Lee Ins. Co. v. Updegrast*, (21 Tenn. Rep. 513).

In our opinion there is no reason to change the result at which the court before arrived.

Judgment in favor of the defendant for the offset claimed. The amount will be adjusted by one of the Judges.

In the opinion delivered by me in May Term, I treated the evidence of witnesses, as to the acceptation of the terms used, as admissible. A custom, it seemed to me, whether as to acts, or meaning of language, is but an aggregation of the practice of individuals, and if this is deposed to without objection, as in the present case, it might be considered in the court above, although certainly the proper question would have been, what the custom

of those engaged in such business was? My brethren are not to be understood as concurring in these views, and find it unnecessary also to express a decided dissent from them.

The decision rests upon the general ground stated.

NOTE.—Since the decision of this cause, I have met with the case of *Waters v. The Monarch Life Ins. Comp.*, (5 Ellis & Blackburn, 872; 2 Br. 1856.) The question was similar in every particular, except that the amount of insurance covered the factor's goods and left a surplus. The decision was, that the policy covered goods held like the present.

JOHN HALL v. JOSEPH NAYLOR.

Upon a credit purchase of goods, the insolvency of the purchaser, and his concealment of the fact, is not of itself sufficient to vacate the purchase for fraud.

The best inquiry is, did the party purchase the goods with the intention not to pay for them?

If actual insolvency is proven, and a transfer of property to pay creditors speedily follows the transaction, evidence may be admitted of representations of solvency made upon other purchases about the same period, from other persons.

And such evidence may, in that case be given, although no representation of solvency was made in the case before the court.

(Before OAKLEY, CH. J., HOFFMAN and SLOSSON, J.J.)

Heard, May; decided, June, 1856.

APPEAL from a judgment, a bill of exceptions being made at the trial.

The action was to recover the possession or value of a lot of hosiery and embroideries, worth \$629⁸⁷/₁₀₀, delivered by the plaintiff, an importer in New York, to Adam Kerr and Charles W. Adams, composing the firm of Kerr & Co., retail dry goods merchants, doing business at No. 767 Broadway, on the 25th and 31st days of March, 1854, which they fraudulently pretended to buy on a credit of eight months. Fourteen days afterwards, they made a general assignment of all their goods to the defendant Naylor, in trust for creditors. Under this assignment, Naylor claimed possession of the property in question.

The plaintiff demanded it of him, and he refused to deliver it. This action was brought April 26, 1854, and requisition made to the sheriff to take possession of the property for the plaintiff.

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On the 28th of April, (before the sheriff had gotten physical possession of all the property, having yet picked out only those of value, \$522 $\frac{51}{100}$.) Naylor gave the undertaking for that purpose required by law, and thereby claimed to have all the property mentioned in the complaint returned to him. The undertaking of Naylor, executed by himself, recited that the sheriff had taken all the property. The sheriff thereupon delivered back to Naylor the property he had taken, and made return to the plaintiff's requisition that he had taken all the property from the defendant, and upon the giving of the defendant's undertaking, and the justification of sureties, had delivered all the property back to the defendant.

The complaint averred, among other things, a delivery before suit of all the property mentioned in the complaint to Naylor. The answer of Naylor denied every thing except this delivery of the property in question to him, and denies specially any such delivery only from the plaintiff.

Upon the trial, the case having been summed up, the defendant's counsel duly requested the Justice to charge the jury as follows:

1st. That if no representations were made to the plaintiff by said Adam Kerr & Co., at the time of said purchase of said goods and merchandise, the defendant is entitled to recover.

2d. That if no representations were made by said Adam Kerr & Co. to the plaintiffs at the time of said purchase, proof of nearly contemporaneous fraudulent representations to other persons does not show that the said purchase was fraudulent.

3d. That defendant under no circumstances can be held liable for more than the amount of goods and merchandise which actually came into his hands, and that there is no evidence that more than \$522.51 worth of goods ever came into his hands.

4th. That there is no evidence to show that there was a relation of special confidence or trust between the plaintiff and Kerr & Co., which imposed upon Kerr & Co. the legal obligation to disclose their pecuniary circumstances to the plaintiff, or which made the purchase fraudulent in consequence of the omission.

5th. That it is not enough for the jury to find that Kerr & Co. had reason to know they were insolvent in order to make the purchase fraudulent. They must find that they actually bought the

goods and merchandise with the predetermined intention not to pay for them.

Thereupon the said Justice charged the jury as requested by defendant's counsel in his fifth proposition, with the modifications contained in the charge, but declined charging the jury as requested in his first, second, third, and fourth propositions, to which decision upon each of said propositions the counsel for the defendant did then and there duly except.

Thereupon the said Justice proceeded to charge the jury as follows:

The question in this case is, whether there was fraud in the purchase of these goods? This is a question for the jury. Did Kerr & Adams, when they bought these goods, buy them with intent not to pay for them? If so, the purchase was fraudulent and void, and the plaintiff is entitled to recover. In passing upon this question, the jury must look at all the attendant facts and circumstances calculated to throw light upon the motives of Kerr & Adams in procuring the goods in question of the plaintiff. Mere insolvency is not, of itself, conclusive evidence of fraud; the party may not know or believe himself to be insolvent. If he does know it, and conceals the fact from the party with whom he deals, he acts fraudulently. Where a merchant is insolvent, and knows it, and goes into the market and buys of a party who has no reason to suppose that he is not solvent, and makes no disclosure of his real condition, or represents himself to be solvent, it is a fraud, and the presumption is, that the party purchased with an intent not to pay for the goods, especially if such purchase is followed by an immediate assignment. In this case no representations are shown to have been made to the plaintiff. If a man, applying to buy goods under circumstances requiring him to tell the truth, as where he is in fact insolvent, and knows it, and expects to fail, and to be unable to pay for the goods, omits to tell the truth and suppresses it, with fraudulent intent, and the goods are delivered to him in reliance upon his integrity and solvency, he is equally guilty of fraud in procuring the goods as if he made a direct false representation. A suppression of facts, material to be made known by a man applying to another for credit on a sale of goods, is as fraudulent in intent, and as injurious in its consequences, as direct falsehood, and the fraudulent intent may be inferred from the fact

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of the suppression under such circumstances. If Kerr & Adams knew of their insolvency, and concealed it from the plaintiff to induce him to part with his goods, and thus procured the goods of the plaintiffs with intent not to pay for the same, it was a fraud, and the jury must find for the plaintiff. If the jury find, however, that they procured the goods of the plaintiff without such fraudulent intent not to pay for them, they must find for the defendant.

If the jury find for the plaintiff, they will find specifically.

1st. The value of all the property mentioned in the complaint at the time the suit was brought, April 26th, 1854.

2d. The value of that portion picked out by the sheriff or the plaintiff's agents.

3d. The value of that portion not shown to have been thus identified by the sheriff, or the plaintiff's agents.

4th. The damages the plaintiff has sustained by the detention of the goods since suit brought. The interest on the whole value is a proper measure of such damages.

It was, thereupon, agreed by the counsel for the respective parties, that the property had been consumed, and a redelivery thereof could not be had.

The jury rendered a verdict for the plaintiff, which is filed and made part of the judgment roll. Whereupon, on due notice, judgment was entered for the plaintiff in conformity therewith.

The jury also answered the questions specifically, which answers it is not necessary to state.

A. Matthews, for the plaintiff.

J. Woodbury, for defendant.

BY THE COURT. OAKLEY, CH. J.—The following propositions involve all the material points raised in the case, and decide the exceptions.

We are of the opinion that it is not enough, in order to avoid a credit purchase of goods, that it turns out the purchaser was insolvent at the time, and had ground to suppose himself insolvent. The proposition that a purchaser upon credit stands in a confidential relation to his creditor, so as to bind him to disclose his situa-

tion, without any inquiry by the seller, is not sustained by any sufficient authority.

If, at the time of a credit purchase, the party is hopelessly insolvent, and knows it, and such purchase is speedily followed by a transfer of all his property for the payment of his debts, evidence may be admitted of other transactions with, or other declarations to different parties, about the same period, tending to the conclusion of a general design to defraud creditors by fraudulent purchases.

The test inquiry in such cases is, did the party purchase the goods in question with an intention not to pay for them? and the seller, after making such a case as is above stated, may introduce evidence of representations of solvency and credit to other persons about the same time.

It makes no difference, in the application of this rule, that no positive representation of solvency was made in the case before the court.

The last two clauses of the charge of the Judge submitted the case to the jury, with the point of law correctly stated. Even if previous parts of the charge admit of a construction not strictly accurate, we are of opinion that such parts are to be controlled by the subsequent clauses.

Applying these principles to the facts of the case, we have no doubt that the judgment should be affirmed.

Order accordingly.

JOHN J. GODIN v. THE BANK OF THE COMMONWEALTH.

Although the date of a bank check is not material to its validity, it determines the time of its payment. Hence, the payment, by a bank, of a post-dated check before the day upon which it is dated, is a payment in its own wrong, and the money so paid remains to the credit of the drawer.

The assignee, in good faith, of this fund, may maintain an action against the bank for its recovery.

A Judge is not bound to submit a question of fact to the jury, when their verdict, if contrary to his views of the testimony and its legal effect, would be certainly set aside, as against law and evidence.

(Before OAKLEY, CH. J., DUER and SLOSSON, J.J.)

June Term, 1856.

APPEAL from a judgment at Special Term in favor of the plaintiff, and denying a motion for a new trial.

The action was brought to recover the sum of \$90, the amount of a check drawn by Shufeldt Brothers & Co., in favor of the plaintiff, upon the defendant, and dated the 14th of July, 1855. The plaintiff also claimed to recover by virtue of an assignment made to him, by Shufeldt Brothers & Co., on the 13th of July, 1855, of all the moneys then due to them from the bank.

The answer denied generally the allegations of the complaint, and set up, as a separate defence, that on the 12th of July, 1855, there had been a final settlement of all accounts between the firm of Shufeldt Brothers & Co. and the bank; that upon this accounting the sum of \$10.21, and no more, was found to be due to the firm, which was then paid to them, and accepted by them, in full satisfaction and discharge of all their claims; and that, at no time after the 12th of July, had the bank in its possession any money or funds belonging to Shufeldt Brothers & Co.

Upon the issue raised by the pleadings, the cause was tried at a Trial Term in December, 1855, and the following were the proceedings on the trial.

The plaintiff called as a witness George A. Shufeldt, Jr., who was sworn, and testified: That he was a member of the firm of Shufeldt Brothers. That in July last that firm kept an account with the Bank of the Commonwealth. That account was balanced on the 11th or 12th of July. I think the 12th.

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A young man came on that day from the bank between two and three o'clock in the afternoon, handed me the pass-book and some vouchers, and said the bank wished to close the account. I told him that I did not transact the business of the firm, and knew nothing about it. There were six checks returned at the time with the pass-book. I did not examine the account or vouchers while the young man was there. About an hour after I found that two of these six checks, each for \$45.31 were dated the 25th day of July, and that they had been paid before they were due. The next day I sent these two checks to the bank. Mr. Winne took them for me. He returned without the money. I then executed an assignment to Godin.

The following is a copy of the account, as it appears in the pass-book, from the 7th of July, 1855, inclusive;

SHUFELDT BROS. & Co.

1855.				1855.	
July 9	To cash,	E. \$21 00	July 7	Balance,	\$125 83
" 10	" " \$700 00		" 9	By cash,	400 00
" "	" " 54 00		" 10	" " 350 00	
" "	" " 45 31				
" "	" " 45 31				
		844 62			
" 11	" Balance,	10 21			
1855.	5 vouchers returned,	875 83			875 83
July 12	To cash,	10 21	1855.		
			July 11	Balance,	10 21

On the 14th Mr. Winne went again with a check, drawn by Shufeldt Brothers, for the balance.

Being cross-examined, the witness says:

I signed the check for \$10.21 now shown to me—

No.

NEW YORK, July 12, 1855.

BANK OF THE COMMONWEALTH,

Pay to

or Bearer,

Ten 21-100 Dollars.

\$10.21

SHUFELDT BROS. & Co.

(Endorsed)

GEO. A. SHUFELDT, JR.

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—when the young man from the bank handed it to me, and he gave me the money for it.

Plaintiff then called Richard Winne, who was sworn, and testified:

I took, at the request of Mr. Shufeldt, these two checks for \$45.31 each to the Bank of the Commonwealth on the 13th or 14th:

Shufeldt Bros. & Co.	Cut by error.	OGDEN.	<p>(1) NEW YORK, July 25th, 1855.</p> <p style="text-align: center;">BANK OF THE COMMONWEALTH,</p> <p style="text-align: center;">Pay to the order of Charles Broome, Esq.,</p> <p style="text-align: center;">Forty-five 31-100 Dollars.</p> <p style="text-align: center;">\$45.³¹/₁₀₀.</p> <p style="text-align: right;">SHUFELDT BROS. & Co.</p> <p style="text-align: right;">CHAS. BROOME</p> <p style="text-align: center;">(Endorsed)</p> <p style="text-align: center;">Pay H. Meigs, Jr., cashier, or order.</p> <p style="text-align: right;">JAS. T. HULL.</p>
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Shufeldt Bros. & Co.	Cut by error.	OGDEN.	<p>(2) NEW YORK, July 25th, 1855.</p> <p style="text-align: center;">BANK OF THE COMMONWEALTH,</p> <p style="text-align: center;">Pay to the order of Charles Broome, Esq.,</p> <p style="text-align: center;">Forty-five 31-100 Dollars.</p> <p style="text-align: center;">\$45.³¹/₁₀₀.</p> <p style="text-align: right;">SHUFELDT BROS. & Co.</p>
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Endorsed.

CHARLES BROOME.

Pay to the order of H. Meigs, Esq., cashier, or order.

JAMES T. HULL.

The writing across the checks, stating that they were cut by error, was not on them when I took them to the bank. I presented these checks to the paying teller of the bank, and asked for the money. He said they had been paid. I then called his attention to their dates. He referred me to the cashier. The cashier took them, and went to the bookkeeper and looked at the books, came back and stated that they had been collected through the Metropolitan Bank. The clerk came back and said the Metropolitan Bank would not pay them. The cashier of the Bank of the Commonwealth then refused to pay the checks, or either of them, to me

when he returned; then the words "cut by error," were written across the face of the checks; they were not written there when I gave them to the paying teller. I then told the cashier that Shufeldt Brothers would sue the bank for the amount of the checks.

The next day I presented the check drawn by Shufeldt Brothers & Co. to Godin, at the bank, and they told me that Shufeldt Brothers had no account there. I made this last demand of the bank at the request of Mr. Godin, the plaintiff.

The following is a copy of the check:—

NEW YORK, July 14th, 1855.

BANK OF THE COMMONWEALTH.

Pay to John T. Godin, or order, \$90—Ninety Dollars.

SHUFELDT BROTHERS & Co.

Endorsed
Collect,

JOHN T. GODIN.
GEO. A. SHUFELDT, JR.

Plaintiff next offered the assignment in evidence, the execution and delivery of which had been before proved.

"For good and valuable considerations we hereby assign, transfer, and set over to John T. Godin all claims and demands which we now have or hold against the Bank of the Commonwealth, in the city of New York, and particularly the sum which we deposited with, and now remaining in said bank.

"New York, July 13th, 1855. SHUFELDT BROS. & Co."

Plaintiff here rested the case.

Whereupon defendants' counsel moved for a nonsuit on the ground—

First. It appeared that the account of plaintiff with the bank was closed by mutual arrangement before the check was drawn to the order of the plaintiff.

2d. That the plaintiff had settled the account by receiving the balance of \$10.21.

3d. That the two checks for \$45.31 each had been rightfully paid.

Defendants' motion was overruled, and his counsel thereupon excepted.

Defendants' counsel then called

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James E. Tompkins, who, being sworn, said: That he was the porter of the bank; that on the 12th day of July the bookkeeper handed him the pass-book of Shufeldt Brothers with the bank, and some cancelled checks, also the check for \$10.21 already produced in evidence, and that sum in money, and instructed him to take them to Shufeldt Brothers and state that the bank wished to close the account: that he did this; went to the office of Shufeldt Brothers and found one of the firm, to whom he delivered the pass-book and vouchers, and requested him to sign the check for \$10.21, and that witness would hand him the money, as the bank wished to close the account. That thereupon Mr. Shufeldt took the pass-book and vouchers, and signed the check for \$10.21, and witness paid him that sum in money. That witness knew the place, and had been there frequently before to inform the firm that their account was overdrawn.

The defendant here rested.

The testimony being closed, the court charged the jury that there was but one question of fact for them to determine, and that was, whether the assignment by Shufeldt Bros. & Co. to the plaintiff was a *bona fide* assignment, or merely colorable? and as to that fact, the defendant had introduced no testimony to impeach the assignment, that if they should find that the same was a mere sham, and only colorable, they should find a verdict for the defendant, otherwise for the plaintiff.

To which charge the counsel for the defendants excepted.

Whereupon the jury rendered a verdict for the plaintiff, for principal, \$90.62, and interest, \$2.59: the whole amounting to \$93.21.

A motion for a new trial upon the case and exceptions was denied at a Special Term in March, 1855.

H. G. De Forrest, for the defendants, appellants.

The judgment ought to be reversed, and the complaint be dismissed, or a new trial ordered.

We insist that a bank has a legal right to pay post-dated checks whenever they are presented, and to charge them at once to the account of their drawers. The body of the check requires payment on presentation, and its actual delivery and negotiation by

the drawer repels any inference to be derived from its date. The true date of a check is presumptively that of its delivery, and its actual date is wholly immaterial, except when referred to in the body of the instrument, and conceding that a bank may decline to pay a post-dated check before the day of its date, it is not bound to do so. It may elect to pay the check when presented, and the payment so made is, therefore, valid.

Again, even if the checks were improperly paid by the bank, the acceptance by the plaintiffs of the balance standing in their pass-book, and the agreement to close their account, was a ratification of the payment and a conclusive waiver of any adverse right. In any event, the defendants had a right to go to the jury upon other questions of fact than the mere validity of the assignment, and especially whether the Shufeldts had not ratified the payment of the post-dated checks by acquiescing in the account as stated in the pass-book.

J. C. Dimmick, for the plaintiff, respondent,

Insisted that there was no other question in the cause than that of the right of the bank to pay the post-dated checks before their maturity; that the payment was wrongfully made, it seemed to him, was a self-evident truth. The only object for post-dating a check must be to postpone its presentation and payment, and that such is the intention, and, therefore, the direction of the drawer, must be known both to the receiver of the check and the bank upon which it is drawn. He has, therefore, no right to present, and the bank no right to pay. The counsel demanded that the judgment should be affirmed, with costs.

BY THE COURT. SLOSSON, J.—Whether the plaintiff could have maintained this action upon the non-refusal of the bank to pay the \$90 check is a question it is unnecessary to decide, since of his right to maintain the action, as assignee, we have no doubt, and it was only upon this ground that he recovered.

The only questions to be considered, therefore, are

1st. Was the bank justified in paying the post-dated checks before their maturity?

2d. Ought any other question of fact to have been submitted to the jury than that which was submitted?

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ssmon/ Though the date of a note, bill, or check, is not material to its validity, it is so in respect to its period of payment. It may be ante-dated or post-dated, without affecting its legal character, as an obligation, but the date determines the time when it becomes payable. (*Parsons v. North*, 13 East. 516; *Brewster v. McCardle*, 8 Wend. 478.)

The checks in question, which were paid by the defendants on the 10th of July, were not payable until presentation on the day of their date, 25th July, and the defendants, therefore, paid them in their own wrong. They had, at the time, funds of the drawers, Messrs. Shufeldt, in hand exceeding the amount of the two checks by \$10.21. This excess was paid to the drawer, two days after the payment of the checks, on what the defendants intended to be a closing of the drawer's account with them; and their defence to this action is, that they had accounted with the drawers, and paid them this balance due them. The evidence, however, falls far short of showing such an accounting, as that the maker of the checks acquiesced in the account made up by the bank, in which these two checks were charged.

This account is contained in the pass-book, in which these checks are charged as "cash" merely, with no designation of date other than that of the payment, (10th July.) There was nothing, therefore, on the face of the account, to apprise Messrs. Shufeldt that those were the two checks in question. He appears to have signed the check for the balance (\$10.21) as soon as it was handed to him, and without examining the pass-book or returned checks. About an hour afterwards, in examining the returned checks, he discovered the mistake, and that the bank had charged these two checks as cash paid 10th July, and the next morning he returned the checks to the bank for payment, which was refused. The bank, however, wrote over the face of the checks, "cut by error." Checks are cut, at a bank, when paid, and the account closed or balanced; writing these words was probably intended by the defendants to protect themselves against any conclusion against themselves in their claim on the Metropolitan Bank, from which they had received them; it was equally an admission in favor of Messrs. Shufeldt on the question of payment. If, on this evidence, the Judge who tried the case had left it to the jury to say whether the Messrs. Shufeldt had acquiesced in the bank

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account as an account liquidated and adjusted, and had ratified the payment of the two checks on the 10th of July, and they had found that question in the affirmative, the verdict could not have been sustained. He was right, therefore, in withholding the question from them.

It follows, then, that the amount of the two checks was never, in contemplation of law, withdrawn from the bank; and when the check in suit for that amount was subsequently made, on 14th July, in favor of the plaintiff, and the drawer's claim on the fund in bank formally assigned to him, the defendants became bound, on presentation of it, to pay it, and having refused to do so, are liable in this action.

Judgment at Special Term, denying motion for new trial, affirmed.

ALEXANDER T. STEWART, WM. H. BURROWES, FRANCIS WAR-
DEN, JOHN F. KING, and PARSONS ROSE, defendants, appel-
lants v. GEORGE SLATER, complainant, and RANDOLPH W.
TOWNSEND, CORNELIUS BAKER, and HENRY BAKER, defend-
ants, respondents.

The law is now settled, that where a mortgage of chattels is presumed to be fraudulent on the ground that it was not followed by an immediate change of possession, an inquiry into the reasons, motives, or causes for not changing the possession is irrelevant, so far as it is designed to raise any distinct question for the determination of the court or jury.

The true and sole inquiry is, whether the presumption of fraud is repelled by evidence that the mortgage was made "in good faith, and without any intent to defraud creditors and purchasers?"

This is a question which, when it depends upon extrinsic proof, belongs to a jury alone to determine.

The verdict of a jury in favor of the validity of the transaction, if founded on pertinent evidence, is conclusive, and so also is the finding of a Judge where the cause is properly tried by a Judge without a jury.

A mortgage given by a partner on his separate property, in which a preference is given to a partnership creditor, is not for that reason fraudulent and void as against the separate creditors of the mortgagor, although in some cases the preference may be declared void at the instance of such creditors, upon a complaint filed on their behalf as a class.

A mortgage of personal chattels in all cases vests the legal title in the mortgagee,

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when by its terms or its legal construction he has an immediate right to the possession.

In all such cases, the mortgagee is, in judgment of law, the absolute owner of the property, and the mortgagor has no interest whatever that can be made the subject of a levy and sale under an execution.

This is true if the mortgage is otherwise valid, even when the mortgagor is permitted to remain in possession, for in judgment of law, he is in possession merely by the sufferance, and as the bailee of the mortgagee.

The provision of the Code which requires a Judge by whom a cause is tried without a jury, to file his decision in writing within twenty days after the trial is simply directory, and its non-observance furnishes no ground for the reversal of his judgment.

Judgment at Special Term modified in a single clause, in all other respects affirmed, with costs.

(Before OAKLEY, CH. J., DUER and SLOSSON, J.J.)

June Term, 1856.

APPEAL from a judgment at Special Term in favor of the complainant Slater, and of the defendants, who are made respondents.

The complaint was filed by Slater to foreclose a chattel mortgage for \$15000, executed and delivered to him by Curtis Judson, upon all the furniture, fixtures, goods, chattels, and personal property of every description then in a hotel in the city of New York, kept by Judson, and known as the Brevoort House. The mortgage is alleged to bear date on the 30th of November, 1854, and to have been duly filed in the office of the Register of the county.

The complaint admitted the execution and delivery by Judson of certain prior mortgages on the same property, and made the respective mortgagees parties defendants. It is not necessary now to state these mortgages, as they are all specially referred to in the finding of the Judge that is given below.

The defendants, Stewart, Burrowes, Warden, and King, forming the firm of A. T. Stewart & Co., in their answer, claimed to have a lien upon all the mortgaged property, by virtue of a levy under an execution in their favor against Judson, and denied upon several grounds the validity of all the mortgages.

The other defendants, the prior mortgagees, in their answers set forth the consideration of their respective mortgages, and insisted on their validity.

The material facts upon which the controversy turned, as found by the Judge at Special Term, together with his conclusions of

law therefrom, are as follows:—As the finding was held by the court at General Term to be conclusive, it is needless to state the evidence upon which it was founded.

HOFFMAN, J.—This cause came on to be tried before me without a jury, and having heard the evidence and the parties therein, I find the following conclusions of fact, in my opinion, material for the determination of the cause:—

1st. That on the 6th day of December, 1854, a confession of judgment without action was made by the defendant Judson, in favor of A. T. Stewart & Co., defendants in this action, for the sum of \$23717.90; that judgment was entered on the 7th, and an execution was issued on the 8th day of December, 1854, and that the sheriff under the same went into the Brevoort House, in which such property was contained, and apprised a clerk that he came to make a levy; that he entered into a number of the rooms and viewed the furniture and articles therein, being all the rooms which were open; that he endorsed upon the execution, after the commencement of this suit, the following words: "On the 8th of December, 1854, I levied on all the furniture, etc., contained in the building known as the Brevoort House, 5th Avenue, corner of Clinton Place, under the annexed execution." That he did not leave any one in possession, nor obtain security, nor attempt any further control of the property; that he did not make any inventory thereof, but desisted from any further action on the ground of the possession taken by the defendant Rose, as mortgagee, hereinafter mentioned.

That on the 27th day of November, 1854, a mortgage on the furniture and property of Judson, in the Brevoort House, was given by the defendant Judson to the defendant Randolph W. Townsend, to secure, (among other sums not material in this cause), the sum of \$1000 due from Judson to R. W. Townsend, for professional services, and \$4900, the amount of a note endorsed by said defendant for Cranston & Judson, and which mortgage was filed on the 28th day of November, at twelve o'clock and ten minutes.

That on the 30th of November, 1854, another mortgage was given by the defendant Judson to the defendant Townsend, for securing the same sums of money, and which was filed on the 1st

day of December, 1854, at nine o'clock and forty minutes. That the second mortgage was given in confirmation of the first, and in consequence of an inventory of the property not having been annexed thereto.

That the amount due upon the said mortgage, was the sum of \$4048.92, on the 10th day of July, 1855, consisting of the sum of \$1043.36, due upon the note given by said Judson for professional services, and for the sum of \$3005.56, the balance due upon the note held by said Townsend, of the firm of Judson & Cranston. That the consideration of said mortgage has been proven before me to be full and just; that the said mortgages were both made in good faith, and without any intent to hinder, delay, or defraud any creditor, purchaser, or any other person or persons whatsoever, and were and are valid and subsisting instruments against all persons covering the said furniture and property; and that there is due to the defendant Townsend, upon the same, the sum of \$4048⁹²/₁₀₀, as of the date of the 10th day of July, 1855.

That a mortgage dated the 28th of November, 1854, upon the same property in the Brevoort House, was executed by the defendant Judson to the defendant Parsons Rose, to secure payment of the sum of \$10,500, and which mortgage was filed on the said 28th day of November, at twelve o'clock and thirty minutes, a true copy of the said mortgage is contained in the preceding case and marked; that such mortgage was given to secure the sum of \$7500 or thereabouts, alleged to be due from said Judson to said Rose, for money loaned and advanced to him, and for a note of \$3000, endorsed by said Rose for the use of said Judson, and subsequently paid by the former; that the validity of such mortgage is put in issue in the pleadings by the complaint, and it is further claimed that the said Rose is to account for the profits, or a proportion thereof received by him, or to be charged with an occupation rent for the use of such property while in possession of the premises as hereafter stated. And further, that I have reserved the determination as to such mortgage and the amount due thereupon, until the result of the inquiry hereafter directed to be made.

That on the day of November, 1854, a mortgage was given by the said defendant Judson to the defendants Cornelius and Henry M. Baker, to secure the sum of \$4796, and which was

filed on the 6th of December, 1854, at ten o'clock and forty minutes. That such mortgage was executed on the evening of the 5th or the morning of the 6th of December. The consideration of such mortgage was the sum of \$796, an amount then due for coal delivered; of the sum of \$2000, which would fall due on the 30th of January, 1855, and of the sum of \$2000, which would fall due on the 5th day of May, 1855.

That the validity of the said mortgage is not contested by any of the parties in this suit, and the amount due thereupon at this date is the sum \$4,917¹⁰/₁₀₀, as of the said 10th of July, 1855.

That the consideration of the said mortgage has been proven to me to be full and just; that said mortgage was made in good faith and without any intent to hinder, delay, or defraud any creditor, or purchaser, or any other person or persons whomsoever, was a valid and subsisting instrument covering said furniture and property against all persons claiming the same, subsequent to the filing of the said mortgage.

That the defendant Judson executed to the plaintiff a mortgage of the property in the said Brevoort House, dated the 5th day of December, 1854, for securing the sum of \$15000. That such mortgage was filed on the 6th day of December, 1854, at ten o'clock and fifty minutes. That the consideration of such mortgage was money loaned by the said plaintiff to the said defendant at different periods, and for services rendered by said plaintiff in his capacity of cook and otherwise, while in the employ of said defendant.

That the validity of such mortgage has been questioned, on behalf of the defendants A. T. Stewart & Co., and others, on the ground of usury, and testimony produced as to such alleged usury, under an amendment of the answer for that purpose allowed at the trial.

That the consideration of the said mortgage to the said George Slater has been proven to me to be full and just and not usurious.

That the said mortgage was made in good faith and without any intent to hinder, delay, or defraud any creditor, purchaser, or any other person or persons whomsoever, and was a valid and subsisting instrument, covering the said furniture and property against all persons, except the said prior incumbrancers.

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That the defendant Judson executed to the defendant Hiram Cranston a mortgage upon the said property, dated the 5th day of December, 1854, and filed on the 7th of that month, for the sum of \$25,000. That such mortgage was to secure the said defendant for the balance, if any, which might be found due to him upon an accounting on their copartnership transactions. That the said Cranston sets up in his answer, that the said Judson is largely indebted to him, which is denied on the part of said Judson. That no sufficient evidence has been adduced to decree the cancellation of such mortgage, as claimed; and that the accounts between the parties are to be taken, upon an inquiry as hereafter directed, if required.

That the said defendant Parsons Rose, holding the mortgage before stated, entered into possession of the property on the 9th day of December, 1854, and continued in possession until the appointment of a receiver, on or about the 2d day of April, 1855; and that his possession was taken by virtue of his said mortgage.

That the receiver appointed in this cause has sold the property put into his possession, and has deposited the proceeds thereof, being the sum of \$27,331.12.

And I find as conclusions of law as follows:

That the mortgages held by the defendants Cornelius and Henry Baker, by the defendant Hiram Cranston, by the plaintiff George Slater, and by the defendant Randolph W. Townsend, respectively, are not rendered invalid and fraudulent by reason of the said several mortgagees therein not taking immediate possession of the property.

That the possession of the defendant Rose, taken on the 9th of December, superseded any right, to take possession, in the plaintiff, or in the defendants C. & H. Baker, or the defendant Cranston, and was subordinate to the rights of the defendant Townsend under the mortgage held by him, and which is recognized in the mortgage to the said Rose—and that the omission to take possession from the 30th of November in the case of the defendant Townsend, and from the 6th of December in the case of the plaintiff and the defendants C. & H. Baker, and the defendant Cranston, between such dates respectively and the 9th of December, was so justifiable under the circumstances of this case as to repel any presumption of fraud.

That there was no such actual levy made under the execution in favor of the defendants A. T. Stewart & Company, as to deprive the said defendants and the plaintiff, the mortgagees in this cause, of any rights held by them or to which they were entitled by virtue of their mortgages respectively.

That the mortgage held by the defendant Townsend is not rendered invalid in whole or in part by being given in part to secure a partnership debt of Cranston and Judson.

That the allegation of usury in the mortgage given to the plaintiff Slater has not been established, and that the same is a valid security for the amount due thereon.

Judgment in conformity to this decision was entered on the 11th of December, 1855, which contained, *inter alia*, the following clause: "It is further ordered and adjudged that it be referred to Robert Emmett, Esq., as referee, to ascertain and report as to the mortgage made by the defendant Curtis Judson to the defendant Parsons Rose, bearing date the 28th of November, 1854, and described in the pleadings herein. That upon such reference, the mortgage to the said Rose be deemed presumptively valid, and made upon a valuable and sufficient consideration, and without any fraudulent intent whatever, but that any party to the action shall be at liberty to impeach the said mortgage, or the consideration thereof, and to produce testimony before the referee for that purpose."

On the 28th of December, the following exceptions to the finding and decision of the Judge were filed by the appellants:

The defendants, Stewart, Burrowes, Warden, and King hereby except to the finding and decision of the court herein at Special Term, as follows:—

1. The court should have found and determined, that on December 8th, 1854, the sheriff of the city and county of New York went to the Brevoort House, and under and by virtue of the execution, in favor of Alexander T. Stewart and others, against Curtis Judson, for \$23,717.90, and interest, duly levied upon all the furniture and property then contained in said house, and belonging to said Judson, or in his possession; that at the time of such levy said property was in the possession of said Judson, and in charge of his clerks and servants, said Judson being temporarily absent from the premises; that said sheriff informed one of said

clerks so in charge of the fact of such levy being then made, and afterwards made a general inventory of the property so levied upon.

2. The court should have found and determined, that by virtue of such levy, the defendants, Stewart, Burrowes, Warden, and King acquired a valid lien upon the said property, to the extent of the amount specified in said execution, and became and were entitled to be first paid out of the proceeds thereof, prior to any claim, right, or lien acquired under or by virtue of the mortgages to Randolph W. Townsend, Cornelius and Henry Baker, George Slater, and Hiram Cranston, or either of them.

3. The court should have found and determined, that the said several mortgages executed by the said Judson to the said Randolph W. Townsend, Cornelius and Henry Baker, George Slater, and Hiram Cranston, of and upon the furniture and property contained in said Brevoort House, were not, nor was either of them, accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, and were, therefore, fraudulent and void, as against the said defendants, Stewart, Burrowes, Warden, and King.

4. The court should have found and determined, that upon the trial of this cause it was not made to appear on the part of the said Randolph W. Townsend, Cornelius and Henry Baker, George Slater, and Hiram Cranston, nor on the part of any, or either of them, that the said several mortgages to them, or either of them, were made in good faith, and without any intent to defraud the creditors of said Judson.

5. The court should have found and determined, that no valid consideration was shown for making the mortgage by Judson to Townsend.

That a copartnership indebtedness of Judson and Cranston to Townsend formed no valid consideration as against the said Stewart, Burrowes, Warden, and King, for making the mortgage to Townsend upon the individual property of said Judson.

That to the extent of such indebtedness of Judson and Cranston to Townsend, the said mortgage to Townsend was entirely void as against said Stewart, Burrowes, Warden, and King, the individual creditors of said Judson.

6. The court should have found and determined, that no valid

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consideration was shown for making the mortgage by Judson to Cornelius and Henry Baker.

7. The court should have found and determined, that after the purchase of the New York Hotel by the defendants, Judson and Cranston, in 1854, it was agreed between them and the plaintiff that inasmuch as Judson had used in such purchase, moneys which he had borrowed from and owed to the plaintiff, the plaintiff should be, and became a copartner with them in said New York Hotel, to the extent and in the share and proportion that such indebtedness bore to the whole cost or purchase money of said hotel.

That thereby said Slater became and was a copartner in said firm of Judson & Cranston, and all such indebtedness was thereby cancelled.

8. The court should have found and determined that no valid consideration was shown for making the mortgage by Judson to Slater.

9. The court should have found and determined, that the mortgage made by Judson to Slater, was usurious and void, and that Stewart, Burrowes, Warden and King, judgment creditors of said Judson, had a right to set up said usury against the claim of said Slater.

10. The court should have found and determined, that the mortgage made by Judson to Cranston was, without consideration, fraudulent and void as against Stewart, Burrowes, Warden and King, judgment creditors of said Judson.

11. The court erred in finding as conclusions of law—

That the mortgages held by Cornelius and Henry Baker, Hiram Cranston, George Slater and Randolph W. Townsend, respectively, are not rendered invalid and fraudulent by reason of the said several mortgagees therein not taking immediate possession of the property.

Also, that the possession of the defendant Rose, taken on December 9th, 1854, superseded any right to take possession in the plaintiff, or in the defendants C. & H. Baker, or the defendant Cranston, and was subordinate to the defendant Townsend; and that the omission to take possession from the 30th November, in the case of the defendant Townsend, and from the 6th of December, in the case of the plaintiff, and of the defendants C. & H. Ba-

ker and Cranston, between such dates respectively and the 9th of December, was so justifiable under the circumstances of the case as to repel any presumption of fraud.

Also, that there was no such actual levy made under the execution in favor of the defendants Alexander T. Stewart and Company, as to deprive the said defendants and the plaintiff, the mortgagees in this cause, of any rights held by them, or to which they were entitled by virtue of their mortgages respectively.

Also, that the mortgage held by the defendant Townsend is not rendered invalid, in whole or in part, by being given in part to secure a partnership debt of Judson & Cranston to him.

Also, that the allegation of usury, in the mortgage given to the plaintiff Slater, has not been established.

Also, that the mortgage to Slater is a valid security for the amount found by the court, or claimed to be due thereon, or for any amount whatever.

The court also erred in adjudging that the plaintiff, or the defendants Townsend and Cornelius and Henry Baker, or any or either of them, were entitled to receive and have any of the moneys in court, in this cause, prior to the payment thereof of the amount so due and owing to the defendants Stewart, Burrowes, Warden and King, upon their judgment docketed in this court on the 6th day of December, 1854, against the said Curtis Judson, for \$23,717.90.

The defendant Rose hereby excepts to the finding and decision of the court herein, as follows:

1. The court should have found and determined, that on November 28, 1854, and during the absence of said defendant Rose from the city of New York, the defendant Judson made and executed to him a mortgage upon all the property of said Judson contained in said hotel, called the Brevoort House, to secure the payment of \$10,500, then actually and honestly owing or due from said Judson individually to said Rose.

That upon the day said Rose first came to the city of New York, after said mortgage was given, to wit, on December 9th, 1854, he immediately took into his possession and custody all the hotel furniture and property contained in said mortgage.

That the property so mortgaged was insufficient for the purpose of carrying on the hotel; a large part of the furniture, &c., neces-

sary for that purpose, and then used in said hotel, belonged to one James M. Sanderson, or his assigns.

That, from the time of so taking possession, said Rose continued the said property in the said hotel, up to the time of the taking possession thereof by the receiver appointed herein, by the order of this court, dated March 29, 1855. That the continuance of the mortgaged property in said hotel was not injurious to it, but, on the contrary, was highly beneficial to said furniture, and was necessary for its due and proper preservation.

That the evidence upon the trial established the fact, that said furniture and property so mortgaged would have been reduced in value one-half, if the said Rose had not continued it in said hotel in maner aforesaid, up to the time of the sale thereof, by said receiver, under the order of this court.

2. The court should have found and determined, that the said mortgage to the defendant Rose had been duly proven upon the trial, and was a valid and subsisting lien upon the proceeds of the sale of said property, and entitled to be paid thereout.

That there should be paid to said Rose, out of the moneys in court, in this cause, the sum of \$10,500, with interest from November 28th, 1854.

That there should also be paid to said Rose, out of said moneys, his costs and expenses in this action.

3. The court erred in directing a reference for the purpose of determining upon the validity of the mortgage to the defendant Rose, all the evidence relating to it having been produced by the parties at the trial; and neither having proposed to offer any new or additional testimony respecting it, the court was bound to find upon the issue thus presented.

4. The court erred in directing a reference respecting an alleged liability of the defendant Rose, arising out of his possession, as mortgagee, of the property mortgaged; or respecting any of the matters directed to be inquired into, upon the reference ordered by the final judgment herein; no facts having been found by the court which would make such reference, for any or either of the purposes aforesaid, necessary or proper.

The appellants herein further except to the judgment in this action, upon the following grounds:

1. Because the finding of the court, upon the facts and the con-

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clusions of law thereon, were not made within the time required by law, nor until after the judgment was entered in this action.

The judgment was entered on December 11th, and the finding and conclusions aforesaid were made and bear date December 20th, 1855.

2. The aforesaid finding and conclusions do not support or authorize the making or entry of the judgment entered herein. Nor is the judgment in accordance with the finding, by the court, of the questions of fact, or law, or both, which arose upon the trial.

The appeal was heard upon a case containing all the proceedings in the cause

H. Hilton, for the appellants.

H. F. Clark, for complainant Slater.

L. Birdseye, for respondents, C. & H. Baker.

D. D. Field, for R. N. Townsend, respondent.

BY THE COURT. DUER, J.—The first inquiry in the proper order of discussion is, whether the mortgage to Mr. Townsend must be adjudged to be fraudulent and void as against the appellants, Stewart & Co.? and in considering this, nearly all the important questions arising in the cause will be determined.

The mortgage to Mr. Townsend is sought to be impeached upon two grounds.

1. That it was not accompanied by an immediate change of the possession of the chattels mortgaged, and that no cause for not changing the possession has been shown, that the law will approve.

2. That the larger portion of the debt for the securing which it was given, was not due from Judson individually, but from the firm of Cranston & Judson, and that this fact rendered the mortgage fraudulent and void on its face as against the separate creditors of Judson, and therefore void as against the appellants, Stewart & Co.

As to the first objection, that there was no immediate change of the possession, we strongly incline to the belief, that the act of 1833,

which declares that a mortgage of chattels, not followed by an immediate change of the possession shall be absolutely void as against creditors and purchasers, unless the mortgage, or a copy thereof, shall be duly filed as directed by the act, was designed to repeal, and ought to have been construed as repealing the provision in the Revised Statutes, which, when the possession is not changed, raises a presumption of fraud that can only be rebutted by evidence that the mortgage was made "in good faith, and without any intent to defraud creditors or purchasers;"—the reasonable construction of the act seems to be, that where the possession is changed, the filing of the mortgage, and where the mortgage is filed, a change of the possession, is unnecessary—the change in the one case, and the filing in the other being equivalent to an actual notice, giving to subsequent creditors and purchasers all the security against fraud that can justly be required, and thus placing a mortgage of chattels when filed, substantially on the same footing as a mortgage of lands, when recorded. It must, however, be admitted, that the Supreme Court decided at an early day, that the act of 1833 was not to be construed as repealing the provisions of the Revised Statutes, but that (in the words of Mr. Justice Bronson,) its only effect was "to add another to the grounds upon which a mortgage of chattels may be declared void." (*Wood v. Lowry*, 17 Wend. p. 492). Nor can it be denied that there are several cases in the court of errors, in which this construction seems to have been adopted and followed. It is, therefore, probable that the question cannot now be regarded as open. Assuming, then, that the statutory provisions are still in force, is it their just interpretation, that a mortgage of chattels not accompanied by a change of the possession, must be adjudged to be fraudulent and void, unless the reasons given for not changing the possession are satisfactory to the court? In other words, is the question whether the presumption of fraud which the statute raises, is repelled by the evidence—a question of law or of fact? is it to be determined by the court alone, or when evidence is produced, by the jury?

We confess our surprise, that at this day such a question should be raised. Many years have elapsed since it was definitively settled, and the whole argument of the counsel for the appellants was built upon a construction which the court of last resort has overruled and exploded.

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It is true that the former Supreme Court, in *Doane v. Eddy*, (16 Wend. 523,) *Randall v. Cook*, (17 Wend. 53,) *White v. Cole*, (4 Wend. 119,) and many other cases, have held the doctrine for which the counsel contended, namely, that in all cases of a sale or mortgage of chattels, some good and sufficient reason, such as the law will approve, must be shown for leaving the property in the possession of the vendor or mortgagor; and that when the property is of such a nature that there may be an immediate change of possession, that change must be made, or the law will pronounce the transaction fraudulent as against creditors and purchasers. But it is equally certain that this doctrine, as repugnant to the plain words of the statute and the manifest intention of the legislature, has been distinctly repudiated and in terms overruled by the court of errors in *Smith v. Acker*, (23 Wend. 653,) *Cole v. White*, (26 Wend. 519,) and *Hanford v. Artcher*, (4 Hill. 272,) and that the paramount and controlling authority of these decisions has been fully acknowledged by the present Court of Appeals in *Butler v. Miller*, (1 Com. 499,) and in *Griswold v. Sheldon*, (4 Com. 581.)

The law, therefore, is now settled, that when a mortgage of chattels is presumed to be fraudulent, on the ground that it was not followed by an immediate change of possession, an inquiry into the motives, reasons, or causes for not changing the possession is irrelevant, so far as it is designed to raise any distinct question for the determination either of the court or jury. The law is settled that the true and sole inquiry is, whether the presumption of fraud is repelled by evidence, that the mortgage (in the words of the statute) was made "in good faith, and without any intent to defraud creditors or purchasers?" that the question of fraudulent intent in this, as in all other cases arising under the statute, where it depends upon extrinsic proof, is purely a question of fact, which it belongs to the jury alone to determine, and that their verdict in favor of the validity of the transaction, if founded on pertinent evidence, is conclusive. Consequently, when a cause involving the question, either from its nature or by the consent of the parties, is tried by a judge at Special Term, his finding of the fact is just as conclusive as the verdict of a jury. The true construction of the statute, therefore, is, that its only effect, when the execution of a mortgage is not followed by

an immediate delivery of the possession, is to throw the burden of proving that the transaction was fair and honest upon the mortgagee, and when the proof thus given by him is relevant and satisfactory, and the mortgage has been duly filed, it matters not how long, or for what reasons, the mortgagor was permitted to retain the possession.

What, then, is the proof which, in such cases, the mortgagee is required to give to rebut the presumption of fraud? It is this, and only this: He is bound to show that the debt mentioned on the mortgage was actually due, and that to secure its payment was the sole object of the parties.

We think with the Judge below that this proof was given in relation to each of the mortgages now sought to be impeached, and are therefore of opinion, that his finding, that each of them was made in good faith and without any intent to defraud creditors or purchasers, is conclusive.

The second objection to the validity of Mr. Townsend's mortgage, that it was given to secure a partnership debt, is also founded on an erroneous view of the existing law, and, emphatically, of the position and rights of Stewart and Co. as the creditors of Judson.

As each partner in a firm is personally liable for the payment of its debts, there is certainly no law that forbids him from paying, or securing the payment of the whole, or of any portion of them, from his own separate property or funds; and in many cases to make such payment, or give such security, may not only be his right, but as between him and his partners a positive duty; the debt or fund or money, may, in respect to the creditor, be a partnership debt, and yet may be one which, in respect to his partners, he is bound to discharge; and, assuredly, it has never been supposed that the creditor to whom the payment is made or security given, is bound to inquire into the accounts of the firm, or that his right to accept such payment, or security, is at all affected by the insolvency of the partner from whom he receives it.

The cases upon which the learned counsel for the appellant rested his argument, it is not difficult to show, are quite inapplicable. It is true, that when an insolvent firm make an assignment of the partnership property for the benefit of their creditors, they have no right to give a preference, in the order of payment, to the

separate creditors of an individual partner; and it may also be admitted that when an insolvent partner makes an assignment of his separate property for the benefit of his creditors, he has no right to give a preference to a creditor of the partnership; in each case the property assigned is considered as a trust fund, applicable, in the first instance, to the payment, in one case, of the partnership, and in the other, of the separate creditors; but in neither case, according to the decision of Chancellor Walworth in *Kirby v. Schoonmacker* (3 Barb. Ch. R. 46), and of this court in *Nicholson v. Leavitt* (4 Sand. S. C. R. 305), does the illegal preference render the assignment wholly void. It is only the clause giving the preference that is rendered void, and it can only be declared so at the instance, and for the benefit, of the creditors whose claims have been unjustly postponed, and who, by such a declaration, become entitled to share in the fund which the debtor had attempted to divert from its proper application. In *Kirby v. Schoonmacker*, where the bill was filed by a judgment creditor on his own behalf, to set aside an assignment made by a partnership, upon the ground that it gave a preference to debts due from the partners individually, the Chancellor, holding that the preference was not evidence of a fraudulent intent that could avoid the assignment, but could be regarded only as a violation of the equitable rights of the partnership creditors as a class, also held, that it was only upon a bill in behalf of all those creditors that any relief could be granted. The bill, not being of this character, was therefore dismissed.

It is obvious that the doctrine which has thus been stated and explained has no application to the case now before us, for not only is no trust created by the mortgage in favor of the separate creditors of Judson, but those creditors as a class are not before the court, nor from the nature of the action—seeking only the foreclosure of the mortgage—could they properly be made parties. Could we, therefore, admit, which we are far from doing, that a mortgage given by an insolvent partner to secure the payment of a partnership debt, may be avoided at the instance and for the benefit of his separate creditors, it still remains certain, that to this relief the defendants Stewart & Co., merely as judgment creditors, and claiming only upon their own behalf, cannot be entitled. This objection to the validity of the mortgage is not one

which they, acting separately, have any right to urge, unless upon the supposition that the execution issued upon their judgment, and the levy asserted to have been made under it gave them a lien upon the mortgaged property which may entitle them to share in the distribution of the fund arising from its sale. It is upon the truth of this supposition that the case of the appellants, viewed in its most favorable aspect, wholly depends. If in no event can they be entitled to a share of the fund in court, it is clear that they can have no right to question the propriety of the judgment that has been rendered.

We are, however, very clearly of opinion that the appellants, neither by virtue of their execution nor otherwise, acquired any lien upon the property mortgaged that can entitle them to share in the distribution of its proceeds. This property was not bound by their execution at all, and the pretended levy was illegal and void. Judson was not the owner of the property when the execution was issued, nor had he any interest upon which the process could attach or that could rightfully be made the subject of a levy and sale under it.

There is a wide difference between a mortgage of lands and a mortgage of chattels. In the first case, as the law in this state is now settled, the estate, subject to the mortgage, remains in the mortgagor, is bound by a judgment, and may be sold under an execution, against him—the mortgage is regarded merely as a security for the debt, and not as a transfer of the title. But a mortgage of personal chattels, in all cases, vests the legal title in the mortgagee, and when by the terms, or by the legal construction of the instrument, he has an immediate right to the possession, although the possession may not in fact have been changed, he is, in judgment of law, the absolute owner, and it is merely as his bailee and by his sufferance that the mortgagor retains the possession. The latter has no interest that is bound by, or can be sold under, an execution against him. When by the terms of the mortgage the mortgagor is to remain in possession for a certain time, his temporary interest, subject to the mortgage, may be levied on and sold, but his interest, in other cases, is a right of redemption only, a mere *chose in action* which, unless united to a right to the possession for a definite period, can never be the subject of a levy and sale under an execution. Such is the estab-

lished and undoubted law, as laid down by Mr. Justice Gardiner, in conformity to many former decisions, in delivering the judgment of the Court of Appeals in *Mattison v. Baucus*, (1 Comst. 295,) *vide* also *Hull v. Carnley*, (2 Duer, 105,) and cases there cited, and *Butler v. Miller*, (1 Comst. 500,) and applying this law to the facts of the case, it is at once manifest that if the mortgage to Townsend, or the mortgage to Rose is valid, the defendants Stewart & Co. have no claim to any portion of the fund to be distributed. If they acquired no lien by their execution, their situation and rights are exactly the same as those of all the other separate creditors of Judson, and which in the present suit we are not at liberty to consider.

That the mortgage to Townsend and the mortgage to Rose are both of them valid we have already decided, in overruling the objection that neither was followed by an immediate change of the possession. The mortgage to Townsend, in addition to the partnership debt of Cranston & Judson, was given to secure a debt of \$1,000 then due to him from Judson personally, and to this extent was certainly valid even against the separate creditors of Judson. It contains no provision giving to Judson a temporary right of possession, nor can it be doubted that, by its legal construction, it vested in Townsend an immediate right of possession, as well as the legal title to the property mortgaged. He was, therefore, when the execution of the appellants was issued, in judgment of law, the sole and absolute owner of the property, subject only to a right of redemption in Judson, and in subsequent mortgagees. The same observations are applicable to the mortgage to Rose: \$7,500 of the debt it professes to secure was due when the mortgage was executed, and that it gave to him an immediate right to the possession, has not been denied.

Placing our decision that the appellants acquired no lien upon the mortgaged property by force of their execution, and can, therefore, have no title to share in its proceeds, upon the grounds that have been stated, it is unnecessary to consider the questions that were raised upon the hearing in relation to the validity of the judgment confessed by Judson to the appellants, and the sufficiency of the levy made by the plaintiff. The objections to the judgment, were it necessary, we should, probably, overrule, but it would be difficult for us to say that a valid levy was, in fact,

made, or if made, that it was not subsequently abandoned. It would seem from the evidence that Rose took and retained the possession of the mortgaged property, not only with the acquiescence of the sheriff, but with the knowledge and consent of the appellants.

Our conclusion is, that the judgment at Special Term, directing that the amount due on Mr. Townsend's mortgage, together with his costs in the action, shall be immediately paid to him out of the fund in court, must be affirmed, and that he is also entitled to his costs on this appeal, to be paid to him by the appellants Stewart & Co.

We are also of opinion that the like judgment must be rendered in relation to the Baker mortgage, the consideration for which was fully proved upon the trial, and which was alleged to be void upon the like ground of the non-delivery of the possession.

Nor can we doubt that it is our duty to render the like judgment in favor of the plaintiff Slater. It is true that the proof upon the trial, in relation to the amount of the debt due to him from Judson, was by no means as clear and satisfactory as that in support of the prior mortgages, nor can it be said that the charge of usury was wholly unsustained; but these are questions of fact which were decided by the Judge in his favor, nor can his finding, in relation to either of them, be set aside as against the weight of evidence. All that can be said is, that the evidence was somewhat doubtful and conflicting. It is also proper to be remarked, that the charge of usury was not made at all in the original answer of the defendants Stewart & Co., and that in permitting its introduction by way of amendment, the Judge exercised a discretion which the provisions of the Code hardly seem to justify—an opinion in which he now fully concurs. Whether the defendants would be entitled to set up usury as a defence at all, is a question of law, which, as the fact has been found against them, it is unnecessary now to determine.

I pass now to the appeal of the defendant Rose. His appeal is limited to that portion of the judgment which directs a reference for the purpose of ascertaining the amount due upon his mortgage, and for taking an account of the profits received by him while in possession, and which also permits any party to the action to impeach his mortgage, and the consideration thereof, and to produce

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testimony for that purpose before the referee. This reference, so far as it admits an account to be taken, we have no doubt was properly ordered, but we agree with the counsel for this appellant, that as the existence and amount of the debt for which the mortgage was given were very clearly proved upon the trial, and no evidence to impeach the transaction was then given or offered to be given, the issue as to the validity of his mortgage, which is raised by the pleadings, ought then to have been determined in his favor; the judgment must, therefore, be modified by striking out the clause which permits the mortgage to be impeached before the referee, and by substituting another affirming its validity.

The only objection that remains to be noticed is one which was relied on by all the appellants. It is, that the decision of the Judge was not given in writing, and filed with the clerk within twenty days after the court at which the trial took place, (Code, § 261). As we intimated to the counsel upon the argument, this is not an objection to which, upon the hearing of an appeal, we can listen, and we trust it will never again be urged. The provision of the Code upon which it is founded, has been frequently decided in the Supreme Court and in this, to be simply directory, and, consequently, that its non-observance by a Judge furnishes no ground for a reversal of his decision. It is neither an irregularity that renders a judgment void, nor an error that justifies its reversal.

The judgment appealed from, modified as I have stated, is, therefore, affirmed.

CATHARINE N. FORREST v. EDWIN FORREST.

The Superior Court of the city of New York has jurisdiction of an action for a divorce, by reason of an adultery committed in this state, when the parties to the action were inhabitants of the state, and residing in it when the offence was committed, and continued to reside in it up to the time of suit brought, and the defendant then resided in that city.

A copy of a paper filed with the clerk of the House of Representatives at Harrisburg, Pennsylvania, on the 21st of February, 1850, purporting to be a petition of the defendant to be divorced from the plaintiff, was allowed to be read without proof of the genuineness of the signature of the defendant to the paper so filed, the only objection made to its admissibility, being that "the absence of

the original was not sufficiently accounted for." The paper so read had been served on the plaintiff by the defendant's direction, with a notice that the original would be presented to the legislature of Pennsylvania, at Harrisburg, on the 21st of February, 1850. The paper or petition purported to have been sworn to by the defendant, on the 16th of February, and such notice was dated the 19th of February: with the paper so filed at Harrisburg was an affidavit of the service of a copy thereof, and of such notice on the plaintiff on the 21st of February, 1850. It was proved that the original was given to the defendant to be carried to Harrisburg, where the legislature was in session at the time, and that notice had been given to him to produce it, and that proper search had been made in the proper places for the original, whether in the custody of the Senate or of the House of Representatives, and that no other petition could be found than the one, of which the paper read was a copy. *Held*, that the paper was properly admitted as evidence of the contents of a petition or paper signed by the defendant.

When a paper is offered in evidence by a party, and excluded by the court, and such party excepts, the decision, although erroneous, will not entitle him to a new trial, if at a subsequent stage of the trial it is again offered by the same party, and admitted and read in evidence, before any witness has been further examined before the jury.

Neither party has a right to read, on the trial of an action, an affidavit made by himself, as evidence in his own favor, of the truth of the statements it contains: the fact that it was opposed, in the action in which it was made, by the affidavit of the other party, does not make it admissible in his own favor in another action to maintain the issues being tried in the latter; either has a right to read an affidavit made or paper signed by the other, if it contains matter pertinent to the issues. If a defendant reads, on the trial of a cause, part of an affidavit made by the plaintiff in another action, the plaintiff has a right to read all other parts of it which are relevant. In such a case, the plaintiff has a right to read not only such other parts as tend to explain, modify, or destroy the effect of the part read by the defendant, but also those parts of it which are pertinent to the general merits of the action and the issues to be tried, although having no connection with the particular matter or subject to which the part read by the defendant relates.

When the affidavit from which a defendant so reads, refers to, and identifies other affidavits made by the plaintiff, and re-affirms the truth of their statements in all respects, the plaintiff may also read from such other affidavits, all parts thereof, which are relevant and material to the issues which the parties are trying.

On the trial of an action in this state, parol evidence of the contents of a paper in another state may be given, when it is shown to be in the possession of a party in such other state, and who, on being examined upon commission, peremptorily refuses to produce it, it not appearing that by the laws of such state he can be compelled to surrender the possession of it to be used in the courts of this state.

The question, what amount of alimony ought to be allowed annually to the wife if a decree of divorce be granted, is a question to be determined by the court, and is not to be submitted to the jury. In this respect, the Code of Procedure has not changed the former practice.

Whether with a view to aid the court in the ultimate consideration of that ques-

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tion, the court may, on the trial of the issues upon which the right to a divorce depends, direct them to find specially the amount and annual value of the defendant's estate? *Quere.*

But the admission of evidence of the value of the husband's estate, "for the purpose of submitting to the jury the question, what amount of alimony ought to be allowed," and limited strictly to that special purpose is no ground for setting aside the verdict upon the main issues upon which the right to a divorce depends. It could not bear in the least degree upon the question whether either or which of the parties had committed adultery, and could not have influenced the verdict upon that question.

And the direction of the court to the jury, if they should find a verdict for the wife, to find also specially what amount of alimony should be annually allowed to her, and their finding upon that question furnishes no ground for setting aside the verdict upon the question of the guilt or innocence of the parties of the adultery charged.

Although the question was for the court and not for the jury, the defendant was in no possible manner prejudiced by the submission of that question to them: if their finding thereon be disregarded by the court, it was superfluous and harmless.

After a verdict in favor of the wife, entitling her to a divorce, the husband is entitled to a hearing and an opportunity to produce proofs upon the question, What alimony should be allowed to her?

The court may require the husband to give security for the payment of the alimony awarded. The allowance of alimony may be made to commence from the time of the bringing of the action. It is erroneous to peremptorily require the wife to release her claim or inchoate right to dower in her husband's real estate.

Although a divorce *a vinculo matrimonii* be granted, yet if such divorce is founded on the guilt of the husband, the wife will be entitled to dower if she survives him.

And although the amount of alimony rests in the sound discretion of the court, the allowance ought not to be made on a condition that the wife release all claim and right to dower.

It seems that on settling the final decree and settling the amount of alimony, it would be proper to give leave to apply to the court for any modification of the allowance which the changing circumstances of the parties—and especially the death of the husband, whereby the title to dower would become absolute—may render just.

(Before BOSWORTH and WOODRUFF, J.J.)

Heard, January; decided, June, 1856.

THIS action came before the court at General Term, on an appeal by the defendant from the whole judgment; and on an appeal by the plaintiff from a part of the judgment. The action was brought by the plaintiff, the wife, to obtain a divorce on the ground of the adultery of the defendant, her husband. The complaint states that the plaintiff and defendant were married in London, in June, 1837, and before January, 1838, removed to

and settled in the city of New York, where they have since resided and still reside. It charged the defendant with having committed adultery in 1840, 1841, 1842, 1843, 1844, 1847, 1848, and 1850, at places and with persons named. It stated that the value of the defendant's real and personal estate was \$200,000, and the clear annual income received therefrom was not less than \$6000, and particularly described some of the real estate which he owned. It contained the other customary allegations of a complaint in such an action, and was duly verified on the 22d of November, 1850.

The answer put at issue the material allegations of the complaint, except that of the marriage. It also charged that the plaintiff had committed adultery in 1844, 1847, 1848, 1849, on some occasions in her own house in 22d street, New York, during the defendant's absence; on others, in Ohio; and on others, in a house in 16th street, where she resided after the parties had ceased to live together, and before this action was commenced. Persons are named with whom the illicit intercourse is charged to have been had, and the place where, and the year in which it occurred.

It admitted that he owned the real estate described in the complaint, but denied that his real and personal estate were worth more than \$150,000, over and above the payment of his just debts, or that his clear yearly income therefrom exceeds \$4,000. The answer was duly verified on the 17th of December, 1850. The answer and complaint contain other allegations which need not be stated.

A sworn reply was interposed on the 21st of December, 1850, denying the allegations of adultery on the part of the plaintiff.

On the 24th of December, 1850, an order was made in the action directing seven specific questions of fact to be tried by a jury. They were tried before Chief-Justice Oakley and a jury; the trial commenced on the 15th of December, 1851, and the verdict was rendered on the 26th of January, 1852. The Chief-Justice also submitted an additional question to the jury, being the eighth of the series hereinafter stated, and the first seven thereof being those directed to be tried by the order of the 24th of December, 1850.

The Chief-Justice, after the evidence had all been given, and

after the cause had been summed up by the counsel for the respective parties, charged the jury upon the facts and law, and in and by such charge submitted to the jury the eight questions, hereinafter set forth, as the issues to be determined by them, and directed them to return answers to said several questions as their verdict in this cause, and the defendant's counsel excepted to so much of the said charge and directions as submitted, the eighth of said questions to the determinations of said jury, and directed them to render a verdict thereon. The jury under such decision and charge, retired, and again returned into court, and for their verdict returned said questions and their answers thereto respectively as follows:

1st. Has or has not the defendant, Edwin Forrest, since his marriage with the plaintiff, Catharine N. Forrest, committed adultery as in the complaint in this action charged? He has.

2d. Were or were not the said plaintiff and said defendant inhabitants of this state at the time of the commission of said adultery by the said defendant? They were.

3d. Was or was not such adultery, by the said defendant, committed within this state? It was.

4th. Was or was not the said defendant a resident of the state of New York, at the time of the commencement of this action? He was.

5th. Has or has not the plaintiff committed adultery, as alleged against her in the answer in this action? She has not.

6th. Was or was not the plaintiff a resident and inhabitant of this state at the time of the commencement of this action? She was.

7th. Was or was not the plaintiff an actual inhabitant of this state at the time of the commission of such adultery by the defendant within this state, and also at the time of the commencement of this action? She was.

8th. What annual amount of alimony ought to be allowed the plaintiff? \$3,000.

The jury say that they find for the plaintiff on the whole issue in the pleadings; and that in answer they find in the affirmative on the first, second, third, fourth, sixth, and seventh questions of fact, specified in the order of December 24, 1850, and in the neg-

ative on the fifth question of fact specified in the said order, and they find that alimony be allowed the plaintiff to the amount of \$3,000 per year.

The said cause having been brought on for further hearing before the same Justice thereof, for the judgment of the court upon the matters aforesaid, on the 31st of January, 1852, the defendant's counsel thereupon claimed and insisted that the Justice was not authorized upon the matters aforesaid to make any award for alimony to the plaintiff.

But the Justice decided to the contrary, and to such decision defendant's counsel excepted.

Defendant's counsel also claimed that the sum of \$3,000 a year was extravagant and unreasonable alimony to be allowed the plaintiff; but the Judge decided to the contrary, and defendant's counsel excepted.

Defendant's counsel also claimed that whatever sum should be allowed the plaintiff for alimony, it should only be made payable from the date of the decree (this present hearing), on January 31, 1852; but the Justice decided otherwise, and to such decision defendant's counsel excepted.

And defendant's counsel further claimed that if such alimony should be made payable from or for any period anterior to the decree, that the allowance voluntarily made and paid by the defendant to the plaintiff, for her maintenance and support, for and in respect to such period, should be credited upon the alimony so to be allowed the plaintiff for and during that time; but the said Justice determined that no counsel fees nor allowance for extra expenses should be allowed the plaintiff in the action, but that the alimony should be allowed without any deduction for such voluntary payments. To such decision defendant's counsel excepted.

The said Justice thereupon, on the 31st of January, 1852, made and rendered a judgment in the action, which, exclusive of its recitals, reads as follows, that is to say:

"And Mr. Charles O'Connor having been heard for the plaintiff, and Mr. John Van Buren for the defendant, and this court having, upon consideration of the facts admitted by the defendant in the pleadings, considered and determined that the allowance for

the support of the plaintiff, hereinafter mentioned, is just, having regard to the circumstances of the parties respectively, it is now ordered, decreed, and adjudged, on motion of the said counsel for the plaintiff, and this court, by virtue of the power and authority therein vested, and in pursuance of the statutes in such case made and provided, doth order, decree, and adjudge that the marriage between the said plaintiff, Catharine N. Forrest, and the defendant, Edwin Forrest, be dissolved, and the same is hereby dissolved accordingly. And the said parties are, and each of them is, freed from the obligations thereof.

“ And it is further ordered, decreed, and adjudged, that it shall be lawful for the said Catharine N. Forrest, the plaintiff, to marry again, in the same manner as if the said Edwin Forrest, the defendant, was actually dead; but it shall not be lawful for the said Edwin Forrest, the defendant, to marry again until the said Catharine N. Forrest, the plaintiff, shall be actually dead.

“ And it is further ordered, decreed, and adjudged, that the said Edwin Forrest, the defendant, pay to the said Catharine N. Forrest, the plaintiff, the sum of three thousand dollars a year from the nineteenth day of November, one thousand eight hundred and fifty, on which day this action was commenced, during her natural life, as a suitable allowance to the said Catharine N. Forrest, the plaintiff, for her support, and that such allowance be paid in the manner following; that is to say, that the sum of three thousand seven hundred and fifty dollars be paid as aforesaid into the hands or upon the order of the said plaintiff, or of her attorneys of record in this action, on the nineteenth day of the month of February, one thousand eight hundred and fifty-two, and that the sum of seven hundred and fifty dollars be paid as aforesaid, into the hands or upon the order of the said plaintiff, or of her attorneys of record in this action, on the nineteenth day of each month of May, August, November, and February thereafter, during the natural life of the said Catharine N. Forrest, the plaintiff. And it is further ordered, that the said Edwin Forrest, the defendant, within thirty days from the date of the entry of this order and judgment, give unto the said Catharine N. Forrest, the plaintiff, such reasonable security for the payment of such allowance, by lien upon his real estate in this state, or otherwise, as may be directed and ap-

proved by this court, upon the report of the clerk of this court, to whom the examination is hereby referred.

“ And it is further ordered, adjudged, and decreed, that the said Edwin Forrest, the defendant, within thirty days after the date of this order and judgment, pay to the said Catharine N. Forrest, the plaintiff, or her attorneys in this action, the costs of this action, which have been taxed, and are hereby allowed, at four hundred and twenty-four dollars and forty-three cents. And it is further ordered, decreed, and adjudged, that from time to time, as any sum or sums shall become payable by the terms of this order and judgment, the said Catharine N. Forrest, the plaintiff, upon the allowance of any Justice of this court, to be made on exhibiting to him and filing an affidavit that such sum or sums hath not or have not been paid, may have an order entered as of course on the foot of this order, decree, and judgment that execution issue, in such form as said Justice may direct, against the said Edwin Forrest, the defendant, for the sum or sums so unpaid, with interest thereon from the time or times when the same shall have become payable by the terms of this order and judgment.

“ And it is further ordered, that whenever the right of the defendant to appeal from this decree shall have been determined by the lapse of time, or by the final affirmance of this decree in the court of last resort, or by the delivery to the plaintiff of a written stipulation, subscribed by the defendant and his attorneys, waiving and relinquishing all right to appeal from the same, and the said defendant shall tender to the said plaintiff such security as aforesaid for the payment of the allowance aforesaid, then the said plaintiff shall execute and deliver to the said defendant a release of any claim of dower in his real estate, in such form as any Justice of this court shall settle and approve.”

(Defendant's exceptions to parts of the judgment.)

And as to those parts of said decree or judgment which ordered and adjudged as follows, to wit: “ And it is further ordered, decreed and adjudged, that the said Edwin Forrest, the defendant, pay to Catharine N. Forrest, the plaintiff, the sum of \$3,000 a year, from the 19th of November, 1850, on which day this action

was commenced, 'during her natural life, as a suitable allowance to the said Catharine N. Forrest, the plaintiff, for her support; and that such allowance be paid in the manner following, that is to say: that the sum of \$3750 be paid as aforesaid into the hands, or upon the order of the said plaintiff, or of her attorneys of record in this action, on the 19th day of February, 1852; and the sum of \$750 be paid as aforesaid into the hands or upon the order of the said plaintiff, or of her attorneys of record in this action, on the 19th day of each month of May, August, November and February hereafter, during the natural life of the said Catharine N. Forrest, the plaintiff."

"And it is further ordered, that the said Edwin Forrest, the defendant, within thirty days from the date of the entry of this order and judgment, give unto the said Catharine N. Forrest, the plaintiff, such reasonable security for the payment of such allowance, by lien upon his real estate in this state, or otherwise, as may be directed and approved by a Judge of this court, on the report of the clerk of this court, to whom the examination thereof is hereby referred."

"And it is further ordered, decreed and adjudged, that from time to time, as any sum or sums shall become payable by the terms of this order and judgment, the said Catharine N. Forrest, the plaintiff, upon the allowance of any Justice of this court, to be made, on exhibiting to him and filing an affidavit that such sum or sums hath not or have not been paid, may have an order entered as of course on the foot of this order, decree and judgment, that execution issue, in such form as said Justice may direct, against the said Edwin Forrest, the defendant, for such sum or sums so unpaid, with the interest thereon from the time or times when the same shall have become payable by the terms of this order and judgment;" and to each and every part thereof defendant's counsel excepted.

Plaintiff's Notice of Appeal, and her Bill of Exceptions.

CATHARINE N. FORREST, plaintiff, }
against
 EDWIN FORREST, defendant }

Please to take notice, that the plaintiff appeals to the General Term of this Court, from that part of the judgment or decree entered in this action on the 31st day of January, 1852, which is in the following words:—

“And it is further ordered, that whenever the right of the defendant to appeal from this decree shall have been determined by lapse of time, or by the final affirmance of this decree in the court of last resort, or by the delivery to the plaintiff of a written stipulation, subscribed by the defendant and his attorneys waiving and relinquishing all right to appeal from the same, and the said defendant shall tender to the said plaintiff such security as aforesaid for the payment of the allowance aforesaid, then the said plaintiff shall execute and deliver to the defendant a release of any claim of dower in his real estate, in such form as any Justice of this court shall settle and approve.”

Yours, &c.,

HOWLAND & CHASE,

Attorneys for plaintiff.

To

VAN BUREN & ROBINSON, Esqrs.,
 Attorneys for defendant.

D. R. FLOYD JONES,
 Clerk of the Superior Court
 of the City of New York.

CATHARINE N. FORREST, plaintiff,	} Bill of exceptions on the
<i>against</i>	
EDWIN FORREST, defendant.	
	part of the plaintiff, to
	be filed with and annexed
	to the Record of Judgment in this action.

City and County of New York, ss.:

Be it remembered, that at a Special Term of the Superior Court

of the city of New York, held at the City Hall of the city of New York, by continuance to and on the thirty-first day of January, one thousand eight hundred and fifty-two, before Thomas J. Oakley, Esquire, Chief-Justice of this court, this cause having been reserved after the entry of the verdict therein to this day for further consideration; and the said plaintiff and defendant having respectively appeared by their respective counsel, and the said court, by the said Chief-Justice, having proceeded to pronounce and enter its decree and judgment of and upon the issues therein, the said court, by the said Chief-Justice, delivered its opinion and decision of and upon the premises, that the said decree and judgment in this action ought to contain a provision in the following words:—"And it is further ordered, that whenever the right of the defendant to appeal from this decree shall have been determined by the lapse of time, or by the final affirmance of this decree in the court of last resort, or by the delivery to the plaintiff of a written stipulation subscribed by the defendant and his attorneys, waiving and relinquishing all right to appeal from the same, and the said defendant shall tender to the said plaintiff such security as aforesaid for the payment of the allowance aforesaid, then the plaintiff shall execute and deliver to the said defendant a release of any claim of dower in his real estate in such form as any Justice of this court shall settle and approve."

But to that opinion and decision the said plaintiff, by her counsel, did then and there object, and insist before the said court, first, that no such provision, or any provision concerning any right or claim of the said plaintiff to dower ought to be contained or inserted in said decree or judgment; and, secondly, that if any provision concerning any such right or claim of dower could rightfully and by the law of the land be inserted in said decree or judgment, the following provision in that behalf should be inserted in said decree or judgment, instead of the provision first above recited in this bill of exceptions:—

"And it is further ordered, that in case the plaintiff shall at any time hereafter become entitled to dower in any lands which now are or were of the defendant, then she, the said plaintiff, shall elect in such form and manner as any Justice of this court may thereafter direct and approve, whether she will take such dower or the allowance aforesaid, and on such election she shall execute a proper

release of said dower, or of all future payments of said allowance to be approved by such Justice."

And to this the counsel for the said defendant then and there objected, and insisted that the said provision first above recited should be inserted in said decree or judgment. And the said court, by the said Chief-Justice, did then and there decide, that the said provision proposed by the said counsel for the plaintiff ought to be rejected, and that the said provision first above recited in this bill of exceptions ought to be inserted in the said decree or judgment, and directed the same to be therein inserted accordingly. To each of which said opinions and decisions the said plaintiff, by her counsel, did then and there in due form of law except.

And inasmuch as the said several matters so insisted on as aforesaid by the said plaintiff, and the opinions and decisions aforesaid, and the said exceptions so taken to the same, do not appear by the record of the verdict and of the decree or judgment in this action, the said Chief-Justice, at the request of the said counsel for the said plaintiff, has put his seal to this bill of exceptions, containing the said several opinions, decisions, and exceptions, pursuant to the statute in such case made and provided, on this thirty-first day of January, in the year of our Lord one thousand eight hundred and fifty-two. THOS. J. OAKLEY. [L. S.]

Defendant's Notice of Appeal.

CATHARINE N. FORREST
against
 EDWIN FORREST.

}

Gent.—Please take notice, that the defendant appeals to the General Term of this court from the judgment entered therein.
 New York, *February* 16, 1852.

VAN BUREN & ROBINSON, defendant's attorneys.

HOWLAND & CHASE, Esqrs., plaintiff's attorneys.

D. R. F. JONES, Esq.,

Clerk of the Superior Court

of the city of New York.

D.—VI.

The appeals were argued together at a General Term held in January, 1856, before Justices Bosworth and Woodruff, and were decided at the following June term. The opinion delivered by the court in support of the judgment pronounced, covered all the points which were argued. The opinion being voluminous, only such parts of it are reported as relate to questions of general interest to the profession. The points made, and to which the parts of the opinion, as reported, relate, are stated in the opinion of the court. Some of them are stated in the form in which they were expressed in the printed points submitted on the argument of the appeals; and the others are so stated in the opinion, as to render a more detailed statement of them unnecessary.

Charles O' Connor, for plaintiff.

John Van Buren, for defendant.

BY THE COURT.—The defendant appeals from the whole, and the plaintiff from a part of the judgment. The points presented by the defendant's appeal will be first considered. The latter appeal presents only questions of law. No motion is made to set aside the verdict as being contrary to evidence. The defendant's printed points, being twenty-seven in number, will be considered in their order.

Defendant's First Point.

The point first made is, that the Superior Court of the city of New York has no jurisdiction in actions for divorce.

It is a sufficient answer to this point, to say, that if the proceeding to obtain a divorce, is an action, within the meaning of that word, as used in the Code, there can be no doubt that this court has jurisdiction.

Section thirty-three of the Code declares that the jurisdiction of this court shall extend to the actions enumerated in section 123 and section 124, in certain cases. (The action for a divorce is not enumerated in those sections.) "To all other actions, where all the defendants shall reside, or are personally served with the summons" within the city and county of New York. The defendant resided and was served with the summons within that city.

“An action,” as defined by the Code, “is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence,” (Code, § 2.) Every other remedy is a special proceeding, and all remedies in the courts of justice are divided into “actions and special proceedings.” (Code, §§ 1 and 3.)

This proceeding is one to redress a wrong, and to enforce a right consequent upon it. It is conducted as all other remedies by action are pursued, by summons and complaint. It is called an action in the Code, and there are provisions in the Code relative to proceedings to be had in it. (Code, § 135 and sub. 5, and § 253.) By whatever tribunal proceedings of this nature are considered in England, we think that in this state, by long and well-settled practice, and the legislation had on the subject, they are to be deemed within the jurisdiction of courts of equity as much as before the recent constitution was adopted, and that the legislature is competent to confer on this court jurisdiction of such an action there can be no doubt. (Cons. Art. 6, § 5 and § 14, and Art. 14, § 12, and Cons. of 1821, Art. 5, § 5, and Art. 7, § 2.)

The legislature was competent to vest, and by unequivocal language has vested in this court, jurisdiction of this action against any person resident in, and served with summons in the city of New York, when the plaintiff is also a resident of the state.

Defendant's Second Point.

“The plaintiff was improperly permitted to read, on the trial, a copy of what purported to be a petition of the defendant to the legislature of Pennsylvania, without proof that the paper from which it was copied was an original signed by him.”

When this paper was first offered in evidence, the defendant's counsel objected “on the ground that it was only a copy, and that the absence of the original was not sufficiently accounted for,” and that objection was then sustained. When it was afterwards received, “the defendant's counsel renewed his objection thereto,” and excepted to the decision admitting it.

This paper had been prepared and served on the plaintiff by the defendant's direction, with a notice that the petition would be presented to the legislature of the state of Pennsylvania, at Har-

risburg, on the 21st of February, 1850. The petition appeared to have been sworn to on the 16th, and the notice was dated on the 19th of that month. The person who served it swore that he had no doubt he compared it with the original sent to Harrisburg, although he had no distinct recollection of so comparing it, or of seeing the original.

It was proved that on a search made in the office of the clerk of the House of Representatives, a paper purporting to be a petition of the defendant, verified the 16th of February, 1850, with a notice dated the 19th of that month, of presenting it on the 21st, with an affidavit of service of a copy of the petition and notice on the plaintiff, by Wm. Ellery Sedgwick, was filed on the latter date, by the clerk. No other petition or copy of a petition was found among the papers in the office of such clerk, or in the office of the clerk of the senate. That paper was, in all respects, like the one admitted in evidence. Notice had been given to the defendant to produce the original on the trial. If it was in his possession or control, the paper read in evidence was properly admitted. Search was made in the proper places for the original. It was made at the places where search should have been made, if the paper was used, as the defendant notified the plaintiff it would be. It could not be found, unless the paper actually found was the original petition. The paper read is proved to be an exact copy of the one so found.

The specific objection being, that the absence of the original was not sufficiently accounted for, and all the search having been made which reasonable diligence required, the paper was properly admitted as a copy.

The testimony showed distinctly that the original "was given to the defendant to be carried to Harrisburg where the Pennsylvania legislature was in session at the time." If he carried it and delivered it according to the direction given to him, then proper search was made and the evidence was clearly sufficient to show, *prima facie*, that the paper found was the one so carried by him and delivered. If he did not carry and deliver it, then presumptively it still remained in his possession and secondary evidence was proper.

(The discussion of points 3, 6, 7, 8 and 9 omitted, as not involving questions of law of general interest.)

Defendant's Tenth Point.

"The court erred in refusing to allow the defendant to read in evidence the letter marked exhibit A, addressed Consuelo, at the stage of the proceedings when first offered."

This letter was subsequently admitted and read in evidence by the defendant.

There is nothing in this point, unless it be a sound rule of law, that a ruling, rejecting evidence offered, erroneous at the time it was made, cannot be cured by admitting the same evidence at the instance of the party excepting, in a subsequent stage of the trial.

The defendant did not stand upon the exception he had taken, but gave other evidence to entitle him to read that letter, and after he had given it, he was allowed, on his own motion, to read, and did thereupon read, it in evidence. No authority has been cited to the effect that for such an error a new trial should be granted.

It is deemed to be well settled law, that if a defendant moves for a nonsuit when the plaintiff rests, which is erroneously denied, yet, if the defendant, although he excepts to the decision instead of relying upon it, proceeds to give evidence in the cause and the plaintiff recovers, a new trial will not be granted for such error, if the whole evidence given is sufficient to uphold the verdict. (2 Wend. 561, 7 ib. 377.)

It seems to us that that case is stronger than the present. In that if a correct ruling had been made, the defendant would have succeeded in the action. If the ruling which the defendant insists was the proper one had been made in this case, and the letter admitted, it by no means follows that the action would have terminated in favor of the defendant.

In that case, the defendant, by not standing upon his exception, loses his right to a new trial. It is difficult to state a principle which should exempt the omission to rely upon the exception in this case from the same consequences.

This view is presented upon the assumption that the ruling by which the letter was excluded, when first offered, was erroneous. In this view of the question we deem it unnecessary to express any opinion whether it was erroneous or not. For, conceding that it was, we do not think a new trial should be granted for that

cause, for the reason, that on the defendant's motion the letter was subsequently read in evidence by him, and before any witness had been further examined before the jury.

Defendant's Eleventh Point.

To understand this point and its six subdivisions, it is necessary to state how the questions arose, and the decisions made which this point brings under review.

In an action pending in the Supreme Court of this state, brought by the plaintiff against the defendant to obtain a divorce, an order was made September 2d, 1850, restraining him from further prosecuting a suit previously brought by him against the plaintiff, to obtain a divorce, in the Court of Common Pleas for the city and county of Philadelphia, or any other suit for a divorce, in any state other than New York, and also restraining him from doing other specified acts.

The defendant moved in the said Supreme Court, on his own affidavit, made November 15th, 1850, and other papers, to dissolve that injunction. It was opposed, among other papers, on an affidavit of the plaintiff, made December 20th, 1850; also on an affidavit made by the plaintiff September 2d, 1850, and which was affirmed by the affidavit of December 20th to be true, and on the complaint in that suit.

The defendant, after the Consuelo letter had been rejected, as stated under his tenth point, apparently for the purpose of furnishing evidence which would establish his right to read that letter, produced the two affidavits of November 15th and December 20th, 1850, and offered "to read in evidence from the last said affidavit of the defendant the statements therein contained as to the manner in which the bundle of letters therein mentioned, in which the letter addressed to Consuelo was alleged to have been contained, had been kept by the plaintiff and discovered by the defendant, and the genuineness and character of that letter, and the nature of the intercourse alleged to have taken place between the plaintiff and Jamieson after her receipt of that letter."

This Consuelo letter, so called, was alleged to have been written by Jamieson to the plaintiff, to have been retained by her with other letters, which, it was averred, she carried about her person, and to have been discovered by the defendant in a private drawer

of the plaintiff's on the 18th of January, 1849. It was also insisted that the contents of this letter implied an admission, if it did not affirm, the fact of improper intercourse having taken place between Jamieson and the plaintiff, and that the discovery of this letter was the cause of the separation.

The plaintiff's counsel objected to any part of that affidavit being read in evidence, and "the court sustained such objection, and held, that no part of such affidavit could be read in evidence unless the defendant's counsel should elect first to read the said affidavit of the plaintiff, and it should appear therefrom that the reading of some parts of the defendant's affidavit was necessary to explain and render intelligible some parts of the affidavit of the plaintiff so read in evidence. To which decision of the court, and every part thereof, the defendant's counsel excepted."

The defendant's counsel then read in evidence from said affidavit of the plaintiff, parts of it which admitted the receipt by her of the paper called the Consuelo letter, and which also denied that she carried it about her person, secreted, or that she kept it concealed.

The defendant's counsel "thereupon proposed to read from the defendant's said affidavit, the statements therein contained, as to the manner in which he had discovered the said letter addressed to Consuelo. Plaintiff's counsel objected, and the court sustained such objection. To which decision defendant's counsel excepted."

"And the plaintiff's counsel hereupon claimed, that the plaintiff's counsel had a right to read to the jury, or to have read by the clerk, other portions of the said affidavit of the plaintiff, or that those portions thereof already read should be stricken out of the case. The Justice so held and decided, and the defendant's counsel excepted to such decision."

"And the defendant's counsel further claimed and insisted, that he should not, as a condition to the parts of said affidavit already read by him being retained as evidence in the cause, be obliged to acquiesce in the reading to the jury of any parts of said affidavit of the plaintiff, except such as might further explain or qualify some of the portions already read, nor any of those parts of said affidavit of said plaintiff which were irrelevant, but the court decided otherwise, and held, that the parts of said affidavit, which the defendant's counsel had read in evidence, should be

excluded from the case, unless he reads, or the plaintiff's counsel was permitted to read, such other parts thereof as the plaintiff's counsel should require to be read."

The plaintiff's counsel thereupon marked parts of plaintiff's said affidavit which he did not desire to be read to the jury, and "called for and required defendant's counsel to read in evidence to the jury all the residue of said affidavit. The Justice sustained such requirement. To each and every part of which said decision of the said Justice the defendant's counsel excepted."

Defendant's counsel, under the requirements of the said decision, read the residue of the said affidavit, and also six of the several parts, specified by the plaintiff's counsel as parts, which he did not insist should be read.

"And hereupon plaintiff's counsel claimed and insisted, that the other affidavit of the plaintiff, made on the second day of September, 1850, having been referred to and re-affirmed in the said affidavit of the plaintiff, of December 20, 1850, the plaintiff was entitled to read or have read in evidence, the said affidavit of the 2d of September, 1850. The court concurred with the plaintiff's counsel, and thereupon the defendant's counsel also read said affidavit of the plaintiff of the 2d of September, 1850. To this decision defendant's counsel also excepted."

The defendant's counsel upon such requirement thereupon read said last-mentioned affidavit.

Defendant's counsel upon the like requirement of the court also read the following portion of the complaint of the said plaintiff in the said suit, pending in the Supreme Court, as follows:

"She, the said plaintiff, has at all times, since her said marriage, lived and conducted herself in a chaste and virtuous manner, as the wife of him, the said Edwin Forrest, and has never committed adultery, or been guilty of any unchaste, impure, or immodest conduct whatever." To the requirement that this part of the complaint should be read, an exception was taken.

"And hereupon the defendant's counsel again offered to read in evidence the said affidavit of the defendant, for the purpose of explaining the statements in the said affidavit of the plaintiff, on the 20th of December, 1850. The plaintiff's counsel objected, and the court sustained such objection, to which defendant's counsel excepted."

“Defendant’s counsel hereupon offered and proposed to read in evidence certain parts of defendant’s said affidavit, but the plaintiff’s counsel objected, and the court sustained the objection, to which decision defendant’s counsel excepted; and the Justice held that the defendant was only entitled to read such parts of his said affidavit as were necessary to render the statements made by the plaintiff in her said affidavit, of the 20th of December, intelligible, and where the same could not be understood without such reference; that the parts offered to be read contained allegations not necessary in order to understand fully the allegations in the plaintiff’s affidavit, and he sustained the objection of plaintiff’s counsel. To which decision defendant’s counsel excepted.” “Defendant’s counsel again offered in evidence the said letter addressed to Consuelo, marked Schedule A; plaintiff’s counsel objected, but the court allowed the said letter to be read in evidence, and it was read.”

Before the evidence was closed plaintiff’s counsel offered in open court:

1st. “That the parts of Mr. Forrest’s said affidavit (of Nov. 15, 1850) which are not marked with a pencil, and now shown to the court, may be read, not as evidence of the facts therein stated, but as mere statements, for the purpose of making more intelligible the parts of Mrs. Forrest’s affidavits, made Sept. 2d and December 20, 1850.”

2d. “That any other part of such affidavit may be, in like manner, read, which the Chief-Justice shall deem relevant, and likely to make more intelligible Mrs. Forrest’s said affidavits.”

3d. “That, in like manner and for the like purpose, any part of Mr. Forrest’s said affidavit, which answers in any way the matters of Mrs. Forrest’s affidavits of Sept. 2d, 1850, (may be read,) beginning with folio 223 of the printed book on this trial, to and including folio 229 of the same book.”

4th. “That the defendant’s counsel may, in like manner, and for the like purpose, read any part of the answer to the complaint in the suit for an absolute divorce in the Supreme Court; and the plaintiff invites the counsel for defendant to point out any other part of the aforesaid affidavit of the defendant which he supposes ought to be read in manner and for the purpose aforesaid, intending, if she can concur in such view of the same, to give her

consent, that the same be read, and the defendant's counsel declined to act upon such offer."

The defendant's 11th point is, that each of the said several decisions is erroneous, and that the aforesaid offer of plaintiff's counsel does not obviate the said errors.

Neither party has a right to read on the trial of a cause, an affidavit made by himself, as evidence in his own favor, of the truth of the statements it contains.

The fact that it was answered in the action in which it was made and used, by an affidavit of the other party, does not make it admissible as evidence in his own favor, on the trial of another action, to maintain the issues being tried in the latter.

Either party has a right to read any affidavit made, or writing signed by the other, if it contains matters pertinent to the issues.

If a defendant reads, on the trial of an action, part of an affidavit made by the plaintiff in another action, the plaintiff has a right to read, or have the whole of such affidavit read, or all parts of it which are relevant, if the whole, or the parts he proposes to read, tend to explain, modify, or even destroy the particular admission or admissions, which have been read as evidence against him from the same affidavit.

May he also read parts of the same affidavit, which contain statements in his own favor, upon the general merits of the action, but which have no connection with the matters of the admission contained in those parts of it read against him, as evidence of the truth of such statements?

Assuming that the plaintiff was entitled to read all portions of her said affidavit; which not only stated the circumstances under which the Consuelo letter was received, and the manner in which it had been kept, and why it had not been destroyed, but also those parts of it which denied that she had written to Jamieson after she received it, or her meeting him but once afterward, or that any thing improper in manner or intent had ever occurred between them, was she at liberty to read other parts of her said affidavit, which in no way tended to explain the full and exact meaning of the passages read by the defendant, or to obviate or fully answer the effect that might be produced, or the inferences that might be drawn from such passages, although material and relevant to the issues to be tried?

In the *Queen's case* (2 Brod. & Bing. 294) certain questions, in the course of the proceedings, were proposed by the Lords to the Judges.

One of the questions proposed an inquiry as to the extent to which a witness for a plaintiff, who, on cross-examination, stated that at a time specified he told one C D he was one of the witnesses against B, the defendant, might be re-examined on behalf of the plaintiff as to the conversation with C D; whether, so far only as such conversations at the time specified related to his being such witness, or whether he could be asked, "as well with respect to such conversation relating to his being one of the witnesses against B, as passed between him and C D at the time specified, after he had told him that he was to be one of the witnesses, as with respect to such conversation as passed before he so told him?"

Best, J., was of opinion that he might, on re-examination, be asked as to all such matters. The other Judges thought otherwise, and concurred in the conclusions stated by Abbott, Ch. J., and in the reasons stated by him in support of them.

Abbott, Ch. J., in delivering his opinion, said:—"I think the counsel has a right, upon re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also of the motive by which the witness was induced to use those expressions; but I think he has no right to go further and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witnesses." * * * "And I distinguish between a conversation which a witness may have had with a party to the suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit are, in themselves, evidence against him in the suit, and, if a counsel chooses to ask a witness as to any thing which may have been said by an adverse party, the counsel for that party has a right to lay before the court the whole which was said by his client in the same conversation, and not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject matter of the suit, because it would not be just to

take part of a conversation as evidence against a party without giving to the party at the same time the benefit of the entire residue of what he said on this occasion.

But the conversation of a witness with a third person is not in itself evidence against any party to the suit. It becomes evidence only as it may affect the character and credit of the witness which may be affected by his antecedent declarations, and by the motive under which he made them; but when once all which had constituted the motive and inducement, and all which may show the meaning of the words and declarations has been laid before the court, the court becomes possessed of all which can affect the character or credit of the witness, and all beyond this is, in my opinion, irrelevant and incompetent."

The rule as here stated allows either party, whose conversation or admissions have been proved by the other, to prove as evidence in his own favor the entire residue of such conversation or admissions, provided only that it is relevant to the issues to be tried. So it also permits a party whose witness, on cross-examination, has testified to conversations between himself and a third person, to prove the entire residue of such conversation, if suited either to explain the sense or meaning of the expressions first testified to, or the motive or inducement of the witness to make them. In other words, as what the witness may have said to a third person is relevant only so far as it may affect his character or credit as a witness, if the party against whom he is called examines him as to any such conversation, the other party may re-examine him as to all of such conversation as is relevant to the issues, which will include only so much of it as tends to illustrate his meaning in what he said and his motive in saying it, or the inducement to the conversation.

In *Prince v. Samo* (7 Ad. and E. 627) it was decided that a witness who, on his cross-examination, had testified to statements made by the plaintiff in a particular conversation, could not, for that cause, be re-examined as to other statements made by the plaintiff in the same conversation, not connected with the statements to which the cross-examination related, although relevant to the issues to be tried.

Lord Denman, Ch. J., in pronouncing the judgment of the court, expressed the opinion that the doctrine laid down by Ab

bott, Ch. J., in the *Queen's* case, in so far as it was not introduced as an answer to any question proposed by the House of Lords, might be strictly regarded as extra judicial, that it was not necessary as a reason for the answer to the question that was proposed, and that it did not rest on any previous authority. The court thought that the line was correctly drawn at the trial, and that the reason of the thing required that a re-examination should be confined to such parts of the conversation as related to the same matter as those to which the witness had testified at the instance of the adverse party.

See *Yates et al. Assignees of Marshall v. Carnsew*, (3 C. & P. 99,) *Sturge v. Buchanan*, (10 Ad. and E. 598,) *Randall v. Blackburn*, (5 Taunt. 245; 2 Carr. & P. 569,) *Smith v. Blandy, et al.* (Ryan & Moody, 257,) *Dicas v. Brougham*, (6 Carr. & P. 249,) *Rex v. Clowes*, (4 Ib. 221,) *Rex v. Higgins*, (3 Ib. 603,) *Rex v. Jones*, (2 Ib. 629,) and see also *Young v. Bennett*, (4 Scam. Ill. 43,) *Sands, &c. v. Crooker*, (3 Brevard. So. Ca. 40; 17 Pick. 182, 10 N. Hamp. 205, 11 Ib. 547, 5 Monroe, Ky. 94.)

In this state, the decisions are uniform in going to the extent that if one party prove a single cause of action against the other, by giving evidence of a conversation of such other party, the latter may prove that in the residue of such conversation, he stated that such cause of action had been extinguished by payment or release, or that he had a subsisting counter-claim which would affect the amount of the recovery, (3 J. R. 427; 9 id. 141; 10 id. 38 and 365; 11 id. 161; 15 id. 229; 6 Cow. 682; 24 Wend. 350, *Garey v. Nicholson*, and 2 Hill, 440, *Kelsey v. Bush*.)

In *Garey v. Nicholson*, the latter sued the former in trespass for taking a mare. It was proved by the plaintiff's son that he took the mare out of the stable by defendant's direction, who was a constable, and claimed to take it under an attachment in favor of one Pine. The defendant's counsel "asked for all the conversation between the defendant and the witness at the time." On objection the evidence was excluded, and defendant's counsel excepted. The plaintiff having obtained a verdict, the defendant brought error, and the judgment was reversed on another ground, but the court held, that there was no error in refusing to admit the whole conversation.

Of this case it is to be observed, that the report of it does not

disclose what the defendant wished or proposed to prove by giving in evidence the residue of the conversation. There is nothing in the terms of the offer from which it can necessarily be inferred that the residue of the conversation was relevant to the issue. If it was, it was clearly admissible under the decisions of the courts in this state, as the cause of action was a single one, and the part of the conversation proved tended to establish it. If the residue of the conversation, if credited, would show that it was discharged, or would justify the apparent trespass, it was admissible, unless it would prove facts, which cannot be proved by parol, and inadmissible for that cause alone.

Cowen, J., in giving the opinion of the court, says, that the rule which entitles a party, a portion of whose conversation has been proved, to have the whole proved, "must obviously mean that the additional conversation called for should be relevant to the matter in issue. All evidence is received under that qualification; and if not so restrained, might operate as a waste of time. Other subjects might be introduced having no connection with the subject matter of the suit."

But an opinion was also expressed by Justice Cowen that the rule must be still further restrained, and that, although the additional matter called for may respect the subject matter of the suit, and make in favor of the party whose declaration is in question, it is not, therefore, always to be received. He cites *Prince v. Samo* and *Green, executor v. Anderson*, (1 Bailey, 358,) and concludes by stating that, "even if these cases are questionable, surely the rule never intended to let in a distinct subject, such as the moral character of the parties, or their standing in the neighborhood. The broad terms of the proposition would have gone to that extent." This case does not decide that all parts of the conversation relevant to the issues could not be proved, because the facts of it, as reported, did not present such a question for adjudication. The opinion argues to the conclusion that they cannot be, as a matter of course, unless they tend to explain, qualify, or entirely obviate the effect of the parts first proved, although relevant to other issues to which such parts do not relate.

The cases in this state falling under our observation and involving the question whether, when part of one party's conversation has been proved by the other, the former may have the whole of

it proved, are cases in which the additional conversation either justified the act, or showed payment, or a release of the demand, or a counter-claim growing out of the original transaction forming the subject of the action, which the parts of the conversation first proved tended to establish. It is difficult to perceive why proof, by a party's admission that he had bought specific property, may be met by proof that he stated at the same time that he had paid for it, and yet that where a plaintiff, claiming to have two distinct demands against a defendant, proves a declaration of the defendant admitting one of them, the defendant may not be allowed to prove that he, in the same conversation and in the same breath, said he had paid the other one.

If the whole residue of the conversation relevant to any of the issues cannot be admitted as a matter of course, but only so much as qualifies, obviates the effect of, or explains the portion first proved, then the rule would seem to be merely this: A party charged by his admissions, in respect to any particular matter, may prove the whole of the admission relative to that matter. His admissions, if broad enough, may be proved, to discharge him from any specific cause of action which the parts proved by the other party tend to establish. But his declarations are not evidence in his own favor, and cannot be used to establish a defence to a cause of action, or a cause of action in his own favor, to which the parts of the same declarations proved by his adversary had no relation.

But the questions under consideration do not arise upon decisions at the trial, as to the right of a party whose conversation has been proved, in part, to have the entire residue of that conversation proved, if relevant to the issues. In this case, instead of proving declarations of the plaintiff, the defendant read part of an affidavit made by her; a document written and single, and the question is, Whether she had a right to read such other portions of it as she was permitted to read?

A closer analogy may be thought to exist between this case, and answers to a bill in chancery when offered in evidence in another action, than between this case and oral conversations which were purely voluntary, when the party was not bound to speak, and silence could not, of itself, have prejudiced him, or affected his rights or liabilities in respect to any matter then being litigated or not being then litigated.

We think there is a marked distinction between the effect of an answer, which is resorted to in the suit in which it is interposed for proof of a particular fact which it admits, and of an answer which is introduced in another action, although between the same parties, as evidence in the cause. Under the practice in chancery, it depended on the frame of the bill whether the plaintiff made the answer evidence against him. If the bill merely stated the facts on which the right to relief was based, and a prayer for such relief, the answer was not evidence against the plaintiff. The allegations which it denied the complainant was bound to prove; what it admitted he need not prove, and any new matter set up it was necessary that the defendant should prove.

If a complainant, in addition to stating the facts on which his right to relief depended, set up various pretences as a basis for interrogatories, and required the defendant to answer, on oath, various interrogatories contained in the bill, all matters contained in the answer, which were fairly responsive to the interrogatories put, were evidence in favor of the defendant. The complainant having made the defendant, *quo ad hoc*, a witness in the suit, all responsive allegations were evidence against the plaintiff.

This doctrine is discussed at length by Chancellor Kent in *Hart v. Ten Eyck*, (2d J. Ch. R. 87-93,) and by Woodworth, J., in the court for the correction of errors, in *Woodcock v. Bennett*, (1 Cow., 743 and 744, and note A).

In *Hart v. Ten Eyck*, some of the items on the debit side of the defendant's account were not supported by proof, unless the defendant's answer was to be treated as evidence to establish them. The Chancellor disallowed them, holding the answer not to be evidence in support of them. But the court for the correction of errors held, that as the defendant was interrogated by the bill, and required to set forth an account of all just debts owing by the intestate, and how and in what manner his estate had been applied or disposed of, the charges contained on the debit side must be allowed, unless disproved or falsified by the plaintiff.

Woodworth, J., quotes the language of Thompson, J., in *Classon v. Morris*, (10 J. R., 542,) that "the respondents having thought fit to make the appellant a witness, they are bound by what he discloses, unless it is satisfactorily disproved. The answer is not to be discredited, or any presumption indulged against it,

on account of its being the answer of a party interested." Woodworth, J., adds: "this rule applies to every case where the answer is within the discovery sought."

The Chancellor, however, seems to have entertained the opinion, that if part of an answer was read as evidence in a court of law, the whole was to be read, and observed that "if an answer is introduced collaterally, and merely by way of evidence in chancery, it ought to be treated precisely as in a court of law." (2 J. Ch. R. 89, 90, 91.

The practical effect of that rule was this: by compelling a defendant to answer interrogatories on oath; all that was said responsively to such interrogatories was evidence against the plaintiff. It did not depend upon his election whether it was to be evidence or not. His own act had made the defendant a witness, and compelled him to testify, and all that the defendant had said became evidence if responsive to the interrogatories. But any thing affirmed, which was not responsive to the allegations, although relevant to the issues, as, for instance, new matter, the defendant must prove.

But the plaintiff was at liberty to disprove, if he could, any of the responsive allegations of the defendant.

This rule did not give a party a chance to infringe another well-settled rule, and make his own declarations evidence in his own favor. But so far as the other side chose to make his declarations evidence, it secured to him the benefit of all that he had said and chose to say, with reference to the matter upon which he had been made to speak, if fairly an answer to any question to which he had been compelled to respond.

With respect to written documents of the one party, a part of which is read by the other, there are decisions to the effect that the whole is to be read if relevant to the issues.

In *Lawrence v. The Ocean Ins. Co.* (11 J. R. 241) the plaintiff, under an order of the court, had been compelled to produce sundry letters relative to the stay of the vessel insured at Gottenburg, and, also, various other letters concerning different events of the voyage, to and from various persons. The defendant's counsel offered to read sundry letters from the supercargo to the owner of the vessel, relative to her stay at Gottenburg. The plaintiff's counsel objected, unless the plaintiff was permitted to read all of

them. The defendant's counsel insisted that reading from the correspondence, as to a particular point, would not authorize the plaintiff's counsel to read what related to other matters wholly distinct. The Judge overruled the objection, and decided that any of the letters might be read by either party, (id. 245-246).

Thompson, J., said the production of these letters, under oath, was a proceeding "analogous to an answer in chancery; and it is an invariable rule that, where an answer is given in evidence in a court of law, the party is entitled to have the whole of his answer read. It is to be received as *prima facie* evidence of the facts stated in it, open, however, to be rebutted by the opposite party." (Peake's Ev. 35-37; 4th Esp. N. P. 21).

Van Ness, J., dissented from the opinion of the court, that the plaintiff was entitled to judgment, but does not seem to have expressed any dissent as to the point now under consideration.

In *Walden and Walden v. Sherburne and Eakin*, (15 J. R. 409,) the action was for goods sold and delivered, money had and received, money paid, and money lent and advanced. A verdict was taken for the plaintiffs, by consent, for \$5000, subject to the opinion of the court on a case, and the damages were to be increased or diminished as the court should direct. The defendants, to prove a credit of \$663³⁷/₁₀₀, on the 28th of December, 1811, produced an account rendered by the plaintiffs, which contained various items of credit to the plaintiffs, (id. 413). This account contained the whole of the plaintiffs' claim, consisting of various items. Their counsel insisted that the defendants, by producing it in evidence, had furnished evidence of the whole of the plaintiffs' claim, which would conclude them unless they disproved the items, (id. 415).

The court, by Spencer, J., said, "the defendant Sherburne, to gain a deduction from the plaintiffs' account, produced the account himself, and by doing so he made it evidence. He might, indeed, contradict or disprove it, but not doing so, it was evidence in the cause to the jury."

If, by reading an item from an account, the whole of it is made evidence for the opposite party, of the credits in it in his own favor, then it is clear that the limitation applied in *Prince v. Samo*, has no application to a written document, whatever should be the rule as to oral conversations.

A plaintiff may prove all of his claim, consisting of several items, except one item. To prove the latter, he reads from an account rendered, or paper signed, by the defendant, an admission that such item is a valid claim. If that authorizes the defendant to read the rest of the account, or paper, as evidence of the items of credit in his own favor contained in it, it follows that he may thus not only furnish evidence of payment of the particular item which it was read to establish, but of credits in his favor which may extinguish all of the several demands against him which had been established by other evidence.

This point seems to have been expressly adjudged in *Low v. Payne* (4 Com. 247). Low sued Payne to recover a balance due upon account. The account consisted of several items, amounting to \$124.26, and the account credited the defendant various sums amounting to \$100.90; for the balance \$23.36 he recovered judgment. On the trial, the plaintiff proved two items, amounting to \$51.65, and made no proof of the other items, except by giving such proof of the plaintiff's books as in the view of the Justice made them admissible as evidence. There was no evidence of defendant's credits, except that furnished by plaintiff's book; plaintiff's book contained two charges for cash paid. The defendant insisted that these two items were not sufficiently proved. The court said:—"the defendant made no proof, but would appropriate to himself the benefit of the credits appearing on the same book, while he denies the plaintiff the full benefit of all his charges. The court below were right in the position held by them, that if the defendant would make the books evidence in his favor, he cannot do so without taking the whole account together. The accounts are received in that case in like manner as the oral admissions of the party, the whole of which or none must be received; the defendant is concluded by it, unless he wholly disprove the items."

In *Winants v. Sherman* (3 Hill, 74) the defendant below offered his books of account in evidence, in order to establish certain matters which he mentioned, under the qualification that they should not be received to prove other matters, to show which, for aught that appeared, they were equally competent. The referees decided in effect, that they could not be received with such a qualification, but must go for what they were worth as evidence generally. This decision was sustained by the Supreme Court.

Kelly v. Dutch Church of Schenectady (2 Hill, 105) was an action by a grantee against his grantor for the breach of a covenant for quiet enjoyment, on the ground that he had been evicted at the suit of one having a paramount title. On the trial he put in evidence a bill of exceptions made and settled in the suit against him, declaring at the time that his only object was to show by what title he was evicted, and that he introduced it for no other purpose. Held, that notwithstanding his disclaimer, the defendant might use the entire contents of the bill for any purpose pertinent to his defence, viz.: to show the ground of recovery against the grantee, and that it was not under claim of title paramount in fact, but because of the grantee having precluded himself from setting up the grantor's title in that suit.

In *Vibbard v. Staats* (3 Hill, 144) it was held, that a party who has proved the confessions of his adversary, cannot, by afterwards waiving such proof, preclude the latter from proving what further was said by him, on the same subject, at the same time, nor could the party proving them have them stricken from the case without the other's consent. See *Sizer v. Burt* (4 Denio, 426); *Morris v. Hurst* (1 Wash. C. C. 433); *Bell et al. v. Davidson* (3 Wash. C. C. 328); *Jacobs v. Farral* (2 Hawks, 570); *Shaller v. Brand* (6 Binn. 435-438); *Dennis v. Barber* (6 Serg. & R. 420-425); *Goss v. Quinton* (3 M. & G. 825); *Bessy v. Windham* (6 Ad. & E. N. S. 166); *Harrison v. Turner* (10 Ad. & E. N. S. 482); *Dagleish, assignee v. Dodd* (5 Carr. & P. 238); *Richards v. Frankum* (9 id. 221).

Viewing the decisions of the courts of this state as harmonious and explicit in stating the rule applicable to such a case, and in applying it to the cases which have been adjudicated, we cannot hold the decision made at the trial erroneous, without making a decision in conflict with them.

One party who uses a paper written, or affidavit made by the other, as evidence, cannot be surprised by the evidence which that other may furnish for himself if allowed to read the residue of it; the one offering it knows its contents, and it is optional with himself whether he will make his adversary a witness or not.

If either chooses to make what the other has written, or sworn to, in relation to the action, evidence in his own favor, by reading a part thereof, it is difficult to assign a reason justified by good

faith and fair dealing between man and man, for which any part of the residue of such paper or affidavit relevant to the matter in controversy in such action should be excluded.

It must not unfrequently happen, that in reading other parts necessary to explain the full and exact sense and meaning of those first read, passages or expressions may be required to be read, which of themselves, may not be strictly relevant to the case, and may not be capable of affecting in any way the conclusions that are to be formed by the court or jury upon the matters in issue. As to such matters, proper instructions must be given to a jury, if they be of a character to call for any instruction from the court.

As to all such matters which could not be supposed capable, from their nature, of influencing the verdict of a jury, it should not be deemed error to refuse to allow the party first reading from the affidavit to contradict them, because such contradiction could not be of the slightest service, and would produce no result except a profitless consumption of time.

The defendant insists that, even if he was bound to submit to the reading of the whole of the affidavit of the plaintiff, sworn the 20th December, 1850, parts of which he had read on his own behalf, it was, nevertheless, erroneous to permit the plaintiff's affidavit of the 2d of September to be also read. The subsequent affidavit of the 20th of December is entitled in the same cause and, as above suggested, reaffirms the other. The affidavit of the plaintiff relates to the same subject; it is again and again referred to in that of the 20th of December, and by such reference and reaffirmance is as fully adopted as a part of that affidavit as it would be had its very language been inserted in the latter. The full meaning and import of the latter, and the extent of its statements and denials cannot be understood without reading the other, and a part of the affidavit of December, which the defendant himself read, contained a reference to the other. We think that these circumstances brought both affidavits within the rule above discussed. In legal acceptance, it is a part of the affidavit of December. See *Tonnele v. Hall*, (4 Comstk. 143,) and cases cited in the opinion of the court, showing that when a will refers to another paper, in terms that leave no doubt of its identity, such paper makes part of the will. That such reference is the same as if it were incorporated in the will, and also that it is not mate-

rial that the one should be annexed to the other, annexation serving no other purpose than to ensure identification, and when identified they make together one instrument, though existing in two distinct papers, whether attached together or not.

As an expression of the sense and meaning of the plaintiff and of what she intended to say, and did in fact say, by signing and swearing to her affidavit on the 20th of December, the two affidavits are one.

If these affidavits are not to be deemed one document in any other sense, they are, we think, to be taken so far as one admission that the use of the one of latest date, reaffirming and referring to the other, made them both evidence in the cause.

In *Layburn v. Crisp* (8 Carr. & Payne) it was held, that if a decree of a court of equity is put in evidence on a trial at law either party may put in the depositions upon which it is founded.

In 6 ib. 437, the defendant on a trial at law read in evidence a part of a record roll of pleas of the crown containing several presentments before the justices in Eyre, it appearing that there was one roll for each hundred, but that one part referred to another part; it was held that the whole must be taken as one indictment, and that the plaintiff might have such other parts read as he thought proper.

In *Goss v. Quinton*, above referred to, the assignees of a bankrupt having brought trespass, and, to prove the defendant guilty of taking the goods in question, produced his examination before the commissioners in bankruptcy. It was ruled not only that his cross-examination was evidence but that an agreement for the purchase of the goods referred to by him on such cross-examination must be considered in evidence also. On a review of the case at bar, Tindal, Ch. J., held that the examination is an entire thing, and that if so required the plaintiff must have elected to read the whole or none.

See also Buller N. P. 238; *Hewett v. Piggott* (5 Carr. & Payne, 75); *Yates v. Carnsew*, (3 ib. 99).

The case of *Lawrence v. Ocean Ins. Co.*, (11 I. R. 242,) above referred to, tends to the same result. And the cases already cited showing that when the plaintiff reads part of the defendant's answer in another suit, the defendant may avail himself of it as evidence in his own favor, upon the ground that "all is evidence

or none," cannot be confined in their application to the mere body of the answer; whatever is annexed thereto, or forms part thereof, is plainly within the rule. See *Lynch v. Clerke* (3 Salk. 154); *Earl of Bath v. Bathersee* (5 Mad. 10); *Blount v. Burrow* (4 Brown, Ch. C. 75); *Clapp v. Wilson* (5 Denio, 285); *Smith v. Blandy, et al.* (1 Ryan & Moody, 257).

The parts of the defendant's own affidavit, which he offered to read, and which the Judge at the trial excluded, were not necessary to be read to explain any parts of the affidavit of the plaintiff; they would in no wise tend to explain; they consist, mainly, of a denial of the truth of some of the statements read from the plaintiff's affidavit.

The reading of them was refused on the ground that they contained allegations not necessary to a full understanding of the statements which had been read from the affidavit of the plaintiff. And if there were any parts of the defendant's affidavits which might have been made more intelligible by any portions of the plaintiff's affidavit, (which we do not perceive,) the offer made by the plaintiff's counsel, withdrawing all objection to their being read on their being pointed out, seems to us to have satisfied every reasonable requirement. Indeed the offer went further, and conceded to the defendant the liberty to read not only all such parts of his own affidavit as would explain, but also such as were an answer to the plaintiff's affidavit of September 2, 1850.

(Points 12 to 22, inclusive, omitted.)

Defendant's Twenty-third Point.

"The court erred in allowing the copy of the letter annexed to the deposition of John W. Forney to be read in evidence, as it did not appear that the original was lost, or in whose possession it was, or but that the plaintiff, with ordinary diligence, might obtain it."

Mr. Forney was examined, and testified that he wrote a letter to a Mr. Roberts, by the defendant's authority and with his assent, but was not perfectly certain that defendant saw it before it was sent. He annexed a copy of it to his deposition. Plaintiff's counsel offered to read it in evidence.

"Defendant's counsel objected that such paper was not suffi-

ciently identified, and that the original ought to have been produced to witness, or its loss shown, or its absence accounted for."

Plaintiff's counsel then read the deposition of said Roberts, taken in Boston. He testified that he resided in Boston, that he knew Mr. Forney, and did receive from him a letter containing an allusion to, or statement concerning, Mrs. Forrest. He further testified thus:

"The letter aforesaid is not in my possession, nor under my control, although I suppose I could obtain the control of it. I have placed it in the hands of other parties, and I decline to produce the same to the commissioner, to be annexed to my deposition. It contains matter of private concern, not relating to the parties to this suit, which I decline to make public; it is a private letter, strictly so, and I cannot divulge its contents without the writer's consent."

The plaintiff's counsel, thereupon, again offered to read the copy in evidence.

"The defendant's counsel renewed his said previous objection to the reading of said paper annexed to the deposition of John W. Forney, (marked A,) but the Justice overruled such objection, and the defendant's counsel excepted, and it was read by the plaintiff's counsel."

If the objection taken to reading the copy is to be understood as meaning that Mr. Forney could not, on commission, be examined as to the contents of the letter he wrote, without having the original before him, or its being first proved that the original was lost or could not be produced on such examination of Mr. Forney, it is clearly untenable.

The object of proving that he wrote a letter to Roberts by defendant's authority, and the contents of it, was, that the plaintiff might be in a position to read the copy at the trial, on showing there that the original was lost or could not be produced. If the objection cannot be construed as taking any other objection to the reading of the copy, than that Forney had not the letter before him when testifying, and that it was not proved before he testified to the contents of it, that it was lost or could not be produced, the exception is untenable.

If the defendant cannot be considered as having objected that no such evidence was given at the trial of the loss of the letter,

or of an inability to produce it, as would authorize a copy of it to be read, then no point is presented for our consideration.

If he may be considered as having taken that objection, then the evidence shows that it was sent into the state of Massachusetts and continued there, and the party having the control of it refused to annex it to his deposition. It was not shown that there were any means within the power of the plaintiff by which the production of it could be compelled.

We think the non-production of an original paper is sufficiently accounted for to admit parol evidence of its contents, when it is shown to be in the possession of a party out of the state, and that all the means which it appears are within the power of the party to compel its production have been employed, and the person having it peremptorily refuses to produce it, especially when it is not made to appear that, by the laws of the state in which he resides, he can be compelled to surrender the possession of it, that it may be used in the courts of this state. (*United States v. Reyburn*, 6 Peters, 352; *Bailey v. Johnson*, 9 Cowen, 115; *Ralph v. Brown*, 3 Watts and Serg., 395; *Boyle v. Wiseman*, 29 Eng. L. and Eq. R., 473.)

Point twenty-four omitted.

Defendant's Twenty-fifth Point.

The defendant insists that the court erred in allowing testimony to be given tending to show the value of the defendant's real estate, and in submitting to the jury the question, What amount of alimony ought to be allowed to the plaintiff?

At the close of the evidence relating to the question of the guilt or innocence of the parties, or either of them, the plaintiff "offered and proposed to prove the value of the real estate belonging to the defendant, for the purpose of submitting to the jury the question as to the amount of alimony to which the plaintiff should be entitled in case a verdict was found in her favor on the issues now tried." The defendant's counsel objected to the introduction of any evidence to the jury as to the value of the property of the defendant. The court overruled the objection, and the defendant's counsel excepted.

Thereupon the plaintiff recalled a witness, Thomas Whitely, who gave evidence touching the value of the defendant's real

estate, which he described, and the value of the several parcels as estimated by him, amounting in all to from \$144,000 to \$167,000.

Under the provisions of the Revised Statutes, when a bill was filed for a divorce on the ground of adultery, if the offence charged be denied, the Court of Chancery was directed unqualifiedly to direct a feigned issue to be made up for the trial of the facts, contested by the pleadings, by a jury of the country. (2 Revised Statutes, 145, § 39, [40]).

This action was commenced on or about the 10th of November, 1850, and the cause was at issue by the putting in of a reply to the defendant's answer on or about the 21st day of December, 1850.

At that time the terms of the Code relating to issues and the mode of trial declared that an issue of fact, in an action for the recovery of money only, or of specific, real, or personal property, (§ 253), must be tried by a jury, and that every other issue is triable by the court (§ 254); which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, etc. By section 72 of the Code, it was also declared that "feigned issues are abolished, and instead thereof, in the cases where the power now exists to order a feigned issue, or where a question of fact, not put in issue by the pleadings, is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried, and such order shall be the only authority necessary for a trial."

It is obvious that under these provisions of the Code the only change made by the legislature in the mode of trial of an action for a divorce on the ground of adultery, by a jury, was a direction that instead of a feigned issue an order for the trial must be made, stating distinctly and plainly the questions of fact to be tried.

And these sections of the Code, read in connection with the section of the Revised Statutes above referred to, produce a result, in actions for divorce, which may be stated thus: "Where the power now exists to order a feigned issue," (Code, § 72,) i. e. "If the offence charged be denied (2 Revised Statutes, 145, § 39 [40]), an order must be made (Code, § 72) for the trial of the facts contested by the pleadings." (2 Revised Statutes, *ut supra*.)

The Statute existing before the Code having made a trial of

the facts contested by the pleadings before a jury a peremptory requirement, it remained so after the Code, substituting an order in the place of the fiction used for that purpose under the former chancery practice.

In this condition of the Statutes on the subject, the order for the trial of the specific questions of fact contested by the pleadings in the present action was made.

Before those questions were brought to trial, in the Session of 1851 the language of the Code was amended.

This gave rise to the doubt which appears to have influenced the conduct of the present trial.

That doubt seems to have been suggested by the amended phraseology of § 252 (Sec. 253 of Code, of 1852), in these terms: "An issue of fact in an action * * * for a divorce from the marriage contract on the ground of adultery, must be tried by a jury."

It is quite clear to our minds, that by the amendment of this section, no change was made in the law regulating the trial of this case in respect to the questions to be tried.

Under the Revised Statutes, and the Code as it stood in 1849 and 1850, "the facts contested by the pleadings" were to be tried by a jury, in pursuance of an order for such trial, stating plainly and distinctly the questions of fact to be tried.

By the amendment of 1851, "an issue of fact" in an action for a divorce * * * must be tried by a jury; and by section 259, an issue of fact arises "upon a material allegation in the complaint controverted by the answer, or upon new matter in the answer controverted by the reply, or upon new matter in the reply," which, by section 168, is to be taken as controverted. It need hardly be added, that under this definition, in section 259, an "issue of fact," which is to be tried by a jury, is equivalent to the language of the Revised Statutes, "the facts contested by the pleadings" must be tried by a jury.

Whether the phraseology of the 253d [252] section now dispenses with the order stating the questions of fact to be tried, it is not necessary to say. If the amendment of that section has not dispensed with such an order, then the questions were properly submitted to the jury under the order made for that purpose. If by such amendment the order is dispensed with, it was, nevertheless, regular and proper to submit the same questions to the

jury to be answered specifically, because the 261st section of the Code, in terms, authorizes the court, in all cases, to instruct the jury to find upon particular questions of fact stated in writing. Both before and since the amendment of 1851, the questions of fact contested by the pleadings, or which is the same thing, the allegations of one party controverted by the other, are to be tried by a jury; and neither before nor since the Code was it necessary to submit to the jury any other questions.

Recurring to the complaint in this action, it appears that the plaintiff, after setting forth the charges upon which she asserts her title to a decree, further avers that the defendant is possessed of sundry lands and the improvements thereon specifically named in the complaint, and also of personal estate of large value, and that the real and personal estates of the defendant are of the value of \$200,000 at the least, and that the clear annual income received therefrom by the defendant is not less than six thousand dollars (\$6000).

Upon the whole complaint, after praying for a dissolution of the marriage contract, the plaintiff also prays that the defendant provide a suitable allowance for her support, and that such judgment for such allowance direct the same to be paid or made out of the property of the defendant, and be made a charge or lien upon his real estate within the state of New York.

The defendant, by his answer, after denying the charges of the plaintiff, and setting up recriminatory charges as a ground for his claim to be divorced from the plaintiff, avers that a certain portion of his real property contains only about fifty-four acres instead of seventy-four as charged by the plaintiff, and denies that his real and personal property is worth more than \$150,000, or that his clear yearly income therefrom exceeds four thousand dollars (\$4000).

Upon the trial, the presiding Judge, instead of submitting to the jury the questions raised by the allegations and denials above stated, (viz., what is the value of the real and personal property of the defendant, and what is the clear yearly income therefrom?) submitted in addition to the questions which had been previously ordered to be tried, the distinct question, "8th, what amount of alimony ought to be allowed annually to the said plaintiff?"

The objections made by the defendant on the trial, and his ex-

ceptions to the ruling of the court in relation to this subject, were two in number. 1st. He objected to the introduction of any evidence to the jury as to the value of the property of the defendant. The court, nevertheless, received the evidence of the witness, Thomas Whitely, upon that subject. 2d. The defendant's counsel excepted to the submission of the 8th question above mentioned to the jury.

In relation to the admission of the evidence, it is to be noticed that the offer of the evidence was limited to a specific purpose, and it was received for that purpose only, viz.: "for the purpose of submitting to the jury the question as to the amount of alimony to which the plaintiff should be entitled in case a verdict should be found in her favor."

If it was proper to submit that question to the jury, then the evidence was relevant and proper. This is not, and cannot be denied. If that question, in the precise form in which it was put, was not a proper one for the decision of the jury, then the admission of the evidence forms no ground, we think, for setting aside the verdict, because, confined as it was to the specific purpose for which it was introduced, it was wholly immaterial and superfluous as respects any other issue. We think that it could not have had any influence upon the verdict in any other respect.

Before the Code, no issue was formed between the parties upon the question of alimony; the facts constituting the grounds of the claim of the party to a divorce, when denied, and the respective allegations of the parties, bearing upon those questions were the subject of the feigned issue, and to be passed upon by the jury, (2 R. S. 145, §§ 39, [40]), and if upon the verdict rendered upon those issues, a decree dissolving the marriage contract was pronounced, the court was authorized to make a further decree to provide for the support of the complainant, (§§ 44, [45]), and not only for her support, but also to compel the defendant to provide for the maintenance of the children of the marriage, and the allowance is to be such as the court shall deem just, having regard to the circumstances of the parties respectively.

Upon an attentive consideration of the subject, we are satisfied that the provisions of the Code have made no alteration in the course of proceeding in this respect, rendering it necessary or proper to submit the question of alimony to the jury. It was no

more their province to determine what further order should be made for the support of the plaintiff than it would be to decide what order should be made to provide for the maintenance of the children of the marriage, if any there were. These are matters for the determination of the court. The provisions of § 44 [45] are above stated, and by § 58 [59] of the 5th article, (2 R. S. 148,) containing general provisions relating to the subject, the court may, when the wife is complainant, during the pendency of the action, or at its final hearing, or afterwards, as occasion may require, make such order as between the parties, for the care, custody, and education of the children of the marriage as may seem necessary and proper, and may at any time thereafter annul, vary, or modify such order, and by § 59 [60] the court may require security, or may sequester the defendant's personal estate, and the rents, etc., of his real estate, and cause them to be applied "towards such maintenance and allowance as to the court shall, from time to time, seem just and reasonable."

Under the similar provisions of the Revised Laws of 1813 (vol. ii., pp. 198-9, §§ 4, 5, etc.) Chancellor Kent held, that it is in the power and discretion of the court to vary the allowance from time to time, according to the circumstances of the parties, and decreed leave to apply to the court for that purpose, "as future circumstances may dictate to be just," *Miller v. Miller* (6 John. Ch. R. 91, 94); so in *Holmes v. Holmes* (4 Barb. S. C. Rep. 295). Mr. Justice Barculo, under similar provisions relating to a divorce *a mensâ et thoro*, modified the order directing the husband to provide alimony, making its relinquishment a condition of the order excluding the husband from the proceeds of property subsequently accruing to the wife; and in *Lawrence v. Lawrence* (3 Paige, 267, A. D. 1832,) the Chancellor held, that the proportion of the husband's property or income which is to be allowed to the wife as alimony, either *pendente lite*, or after the termination of the suit, is in the discretion of the court. The language of the Chancellor, as well as the language of the statute itself, (§ 44 [45], and § 53 [54],) warrant no distinction in this respect between an action for a divorce *a vinculo matrimonii*, and a divorce *a mensâ et thoro*, and the Chancellor adds, that, in fixing the amount to be allowed, the court must take into consideration the nature of the husband's means, the situation of the parties in society, the amount of his

income, and whether it is from property already acquired or from his personal and daily exertions; whether there are or are not children or other relations of the husband who have claims upon him for sustenance, etc., the husband's ability to support himself, and family, etc.

Neither these circumstances, nor the discretion which was to be exercised thereupon, were the subjects of inquiry under the feigned issue directed by § 39 [40] of the statute. That by the terms of the statute, related to the offence charged, and by it were tried and determined the facts upon which the rights to a dissolution of the marriage contract depended. In practice, the court in settling the feigned issues, inserted therein inquiries into the matters set up as a defence, as well as the inquiry into the offence charged in the bill, (see Ch'y Ct. Rules, 168,) and added an inquiry into the legitimacy of the issue of the marriage, when that question was distinctly made in the bill of complaint, and which the statute directs shall be determined upon the proofs in the cause. (*Cross v. Cross*, 3 Paige, 140; *Wood v. Wood*, 2 Paige, 109; *Smith v. Smith*, 4 Paige, 435, rule 169). Nothing in the statute, nor in the practice of the court, made it the duty of the court to embrace in the feigned issue the amount of alimony, or the facts upon which it depended. But after the trial of the feigned issue, the cause was brought regularly to a hearing at a stated term of the court, at which, if a decree of divorce was granted, such further decree was made in respect to alimony, and the care, custody, etc., of the children, if any, as seemed just in the discretion of the court, (rule 170, *Daggett v. Daggett*, 5 Paige, 509,) and a reference, for the purpose of ascertaining what was proper, was made if necessary (*Green v. Green*, 2 Paige, 62; 2 Barb. Chy. Practice, 259, 260, and cases cited, pp. 267-8.) The case of *Burr v. Burr*, in 7 Hill, 208, shows that the subject of alimony rests in the discretion of the court in the fullest manner.

As already suggested, the provisions of the Revised Statutes on this subject are unrepealed, and, with the single difference that a feigned issue is no longer proper, the practice under the statute does not appear to us to be changed. The questions to be tried by the jury remain the same. The facts contested by the pleadings before the Code, were the material allegations going to the design and object of the bill, to wit: the decree of divorce; the

“further decree” consequent thereon was then, and is now, for the determination of the court, under all the circumstances of the case, and the situation of the parties, embracing various facts which formed no subject of allegation in the complaint or answer, and not the subject of consideration at all until it was first determined whether a divorce should or should not be granted. (See also *Forms of Bills of Divorce*, 2 Hoffman Chy. Practice; 2 Barb. Chy. Practice, and other books of precedents.)

And that the practice on this subject is not altered by the 253d [252d] section of the Code, directing that an issue of fact in an action for a divorce shall be tried by a jury, further appears by the rules adopted by the Judges of the several courts in 1852 and 1854, (rule 70 [71],) which require the cause to be heard at a Special Term after the trial of the issue.

Our conclusion, therefore, is, that the “material allegations in the complaint controverted by the answer,” (Code, § 250,) which constitute an issue of fact to be tried by a jury in an action for a divorce from the marriage contract on the ground of adultery, (Code, 253,) are those allegations in the complaint upon which the right to the decree for a divorce depends. These, and these only, are a necessary part of such a complaint. The circumstances which, in a subsequent stage of the proceedings, are to regulate the discretion of the court in its further decree awarding alimony, are not necessarily nor regularly any part of the issues between the parties; they are matters which, at a proper time, and in such form as may be thought proper, are to be laid before the court itself, for the guidance of its discretion in a matter with which the jury have nothing to do.

We do not find it necessary to say that the allegations in the present complaint, respecting the amount and value of the defendant’s property, and the income therefrom, and the defendant’s denials, addressed to those subjects, were wholly irrelevant, or should have been struck out on motion. It has been, by some of the decisions under the Code, held that any facts may be stated in the complaint which may affect the ultimate relief to which the plaintiff may be entitled, and even such as may, in an equity suit, affect the question of costs only. We think, however, that the introduction of such averments in an action for divorce in nowise enlarged the issues which the statutes require should be submitted

to the jury. They are in no sense the "facts constituting the plaintiff's cause of action (Code, § 142). They are not facts which the plaintiff must prove in order to maintain her suit; and, in our judgment, it is the better practice not to insert them in the complaint at all.

Nor do we find it necessary to say that the court, under its general authority to propose questions to the jury, might not (under § 71, or under § 261) have directed the jury to find specially what is the amount and annual value of the defendant's property, with a view to use such finding as one of the elements to be afterwards considered in connection with other circumstances in determining what the further decree, in regard to alimony, should award to the plaintiff. We doubt whether in practice that would be deemed the best mode of conducting the trial of the main questions, which, where there are recriminatory charges and allegations of condonation, are already sufficiently complicated. When the value and income of the defendant's property are found there remain other matters to be considered and facts to be taken into view to enable the court to determine what shall be such further decree, as already above suggested. On this point it must suffice to say that no such question was in this case ordered to be tried by the jury pursuant to § 71, and no such question was submitted by the Judge on the trial under § 261. The comprehensive question—what alimony ought to be allowed to the plaintiff?—which the Judge did submit to the jury, was a question involving not only an inquiry into the amount and value of the defendant's property but many other considerations, and we cannot resist the conviction already expressed that this question was for the court and not for the jury.

The result is, that evidence was suffered to go to the jury tending to prove the value of the defendant's real estate, when for the purposes of any question properly submitted to the jury such evidence was wholly irrelevant.

If we could see that evidence showing the defendant's real estate to be worth from \$144,000 to \$167,000, by any rational view of what is possible, could have influenced the minds of a jury unfavorably towards him upon the question whether he had or had not committed adultery, or whether the plaintiff was or was not guilty, we might feel bound to order a new trial because

such evidence was received. (*Marquand v. Webb*, 16 J. R. 90; *Osgood v. Manhattan Co.* 3 Cow. 612; *People v. Wiley*, 3 Hill, 194; *Weeks v. Lowerre*, 8 Barb. 534; *Clark v. Vorce*, 19 Wend. 232; *Dresser v. Amworth*, 9 Barb. 625; *Myers v. Malcolm*, 6 Hill, 296; *Boyle v. Colman*, 13 Barb. 42; *Worrall v. Parmelee*, 1 Coms. 520; *Cary v. Sprague*, 12 Wend. 41.)

The cases cited, and others therein referred to, warrant us in saying that where the admission of the evidence, on its face and by legal necessity, could do no injury, because it does not bear in the least degree on the question in issue, it may be disregarded. Here it was not offered, nor received, for any purpose affecting the main issue, and it was so expressly stated, and only received under that limitation.

For the purposes of such an inquiry as this the jury must be assumed to have ordinary intelligence, and to be governed by conscientious motives. To suppose that proof that the defendant was worth \$144,000 could affect their determination of the question whether he or the plaintiff had committed adultery, is to deny to the jury, as we think, common sense; and to suppose that they would allow such evidence, when received for another and totally distinct object, to influence them improperly on this question, is to deny them common honesty. We think, for this reason, that the admission of the testimony furnishes no ground for revoking the judgment. If we are in error in our conclusion, that the amount of alimony was not a question proper to be submitted to the jury, then it is obvious that the testimony so admitted was competent, because it tended directly to one of the chief elements taken into view in determining that question.

The next inquiry is, whether the judgment should be reversed because the question, what amount of alimony ought to be allowed to the plaintiff, was submitted to the jury. We have no hesitation in saying that it ought not, although we are of opinion that the jury were not to determine that question between these parties, and that for the purposes of the trial their views upon that question were immaterial. We cannot discover or imagine that any injury resulted to the defendant from telling their opinion upon that subject, unless the court made it the basis of the further decree for alimony afterwards made, which subject will be presently considered.

The jury having found upon the questions upon which the right to a divorce depended, it was, at most, superfluous to ask them to say what alimony should be awarded. Their finding upon the latter question had no possible bearing upon the former.

Under § 261 of the Code, a discretion is given to the court to instruct the jury in all cases to find upon particular questions of fact. If the verdict is in other respects correct, it would be unreasonable to say that it must be set aside if the court should take a finding from the jury upon a matter that was in truth irrelevant, which could not influence the general verdict or the finding upon the other questions.

On that subject the general rule must be that it rests in the discretion of the Judge to submit such questions as at the time he thinks proper, and if upon the whole verdict the plaintiff is entitled to judgment, the circumstance that in addition to a finding upon material questions we have also a finding upon some that are not material to any determination proper to be made by the jury, ought not to vitiate the verdict. So that we say, as in relation to the last point discussed, If we err in holding that this was not a proper question to be submitted to the jury, then of course the defendant's exception fails; and if we are right, then the submission of the question to the jury, and their finding thereon, was mere surplusage, it injured no one and should be wholly disregarded.

Defendant's Twenty-sixth and Twenty-seventh Points.

It remains to consider, under the defendant's appeal, the proceedings had after the coming in of the verdict, in which the jury had found that \$3,000 ought to be allowed to the plaintiff, and to which the defendant's 26th and 27th points are addressed. The bill of exceptions states that the cause having been brought on for further hearing for the judgment of the court, the defendant's counsel claimed and insisted—

That the court was not authorized to make any award of alimony "upon the matters aforesaid."

If by this was meant that the court was not authorized to award alimony at all, this claim was plainly unwarranted and in the very face of the statute.

If it was meant that there was an irregularity in the manner of

bringing on the cause for a further hearing, then we can only say that the objection for want of regularity should have called the attention of the court to the supposed irregularity.

If it was meant that the jury, and not the court, were to determine the question, the views above expressed dispose of that objection, and we may add that if it was a question for the jury their finding was of the precise amount the court awarded.

If it was meant that the case was not in readiness for such further decree, that the proper inquiry had not yet been made by the court, and that the verdict of the jury on this point ought not to be taken into view, it being without their province, and that a reference to ascertain the facts bearing on the question, or a taking of proofs by the court, in some manner, so that the defendant might produce witnesses as to the value not only, but also as to the income of the defendant's property, and to the other various circumstances which, as above stated, are to be considered by the court in determining the amount of alimony :

If this was the meaning of the objection—and though not very clearly expressed it seems to us to warrant that construction—it was reasonable.

The language of the subsequent objections, to wit: That three thousand dollars a year was extravagant and unreasonable; that alimony should be only allowed from the date of the decree; and that if alimony should be awarded from the date of the filing of the bill of complaint, the voluntary provision made by the defendant for the plaintiff's support, from the time of the commencement of the suit until the date of the decree, should be taken into view, seem to indicate that further inquiry was insisted upon.

Although the cases above referred to show that the extent of the allowance rests in the discretion of the court, the cases on this subject do not show that, in general, the permanent alimony is to take effect from the filing of the bill. In most of the cases the permanent provision is made to commence at, or about, the time of the decree for a divorce. (*Miller v. Miller*, 6.J. Chy. R. 93; *Packford v. Packford*, 1 Paige, 274; and see, also, *Lawrence v. Lawrence*, 3 Paige, 267, and other cases above referred to.) In *Richmond v. Richmond*, (1 Green's New Jersey Chy. R. 90,) it is held that there is no fixed rule as to the amount; that each case depends upon its own circumstances; that a regard should be had

to the actual rents and profits of the defendant's estate, and the actual wants of the complainant, but not solely to those considerations; and in estimating such rents and profits, the estimate should be taken not by its value at the filing of the bill, but at the date of the Master's report. And, on the other hand, in *Burr v. Burr*, (10 Paige, 38,) the Chancellor directed explicitly that the alimony should commence from the filing of the bill, (in that respect correcting the decree made by the Vice-Chancellor, which allowed alimony only from the date thereof). And his decree, in this respect, is affirmed on a full discussion of the subject by the court of errors. (7 Hill, 208). But the Chancellor directed that the *ad interim* alimony, received by her or her solicitor *pendente lite*, be deducted. (See *Rose v. Rose*, 11 Paige, 166.) Our conclusion is, that it was not erroneous to allow alimony from the time when the suit was commenced if, under all the circumstances, that seemed just to the court. There was no evidence produced on this further hearing, in relation to the voluntary payments by the defendant pending the suit, unless it be, perhaps, the statements of the witnesses, and the affidavits read on the trial, or found in the minutes of the court, and these do not appear to have been referred to as the basis of the further decree. The court are represented as deciding that alimony should be allowed without any deduction for such voluntary payments. If the facts on this point were agreed to by counsel, it does not so appear; and it is quite difficult to say, upon the statement contained in the bill of exceptions, whether any thing was before the court as the ground of the order, except the pleadings in the action and the verdict of the jury. The decree of the court, however, states that the court, "upon consideration of the facts admitted by the defendant in the pleadings," determined that the allowance of three thousand dollars a year, from the day this action was commenced, during the natural life of the plaintiff, is just, "having regard to the circumstances of the parties respectively," and ordered and adjudged, etc., accordingly.

We have already said that we think the verdict of the jury furnished no proper guide on this question, and the only admissions in the pleadings are that the defendant's real and personal estate is worth one hundred and fifty thousand dollars, and the income therefrom is four thousand dollars.

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Upon this part of the case, we think an opportunity should have been permitted to the defendant to produce proofs, and either on a reference, or on a hearing before the court, show the facts and circumstances which are proper to be considered in determining the amount of alimony, the time when it should commence, and whether any, and what, voluntary or other allowance *pendente lite* had been made to the plaintiff by the defendant. The views which we entertain in regard to the points raised by the plaintiff's appeal from the decree herein, confirm us in our opinion that this portion of the decree should be the subject of further inquiry. It seems to us, that that part of the decree which requires the plaintiff to release her inchoate right of dower in the defendant's real estate, must necessarily be taken to have influenced the court in fixing the amount of the plaintiff's allowance during her life, and our conclusions in regard to that requirement of the decree, render it necessary that the provision to be made in regard to alimony should be the subject of inquiry, if the defendant shall elect to have a reference for that purpose.

We have only to notice the further exception to that requirement of the decree, which directs that the defendant give security for the payment of the allowance by a lien upon his real estate, within this state or otherwise, as may be directed by the court upon the carrying in of the report of the clerk of this court, to whom the matter is referred. No objection to this part of the decree was urged upon us, on the argument of the appeal. The statute, in terms, authorizes the court to require such security. (2 R. S. 148, §§ 59, [60] 60). The practice of the Court of Chancery, in like cases, sanctions it, (*Miller v. Miller*, 6 J. Chy. R. 93; *Burr v. Burr*, 10 Paige, 38, and other cases above referred to); and the decree, in this respect. It was within the ordinary power of the court to refer a matter of that description, if it was found convenient.

If, however, the defendant shall elect to have a reference to determine the amount of alimony, the security to be given therefor can be included in the same reference.

The order herein will therefore be, so far as it is based upon the defendant's appeal, that the judgment be reversed, so far as it determines the amount of the alimony to be awarded to the plaintiff, and the time from which it is to be allowed; and a reference

is ordered to some proper person, to be agreed upon, or appointed by the court on settling the order, unless the defendant shall prefer to allow the judgment in this report to stand, and shall so elect. The same referee may also, as above suggested, inquire into and report what security should be given.

Plaintiff's Appeal.

The points raised by the defendant upon his appeal, being considered, there remains for determination the exceptions taken by the plaintiff to the decree made on the final hearing.

The decree, after directing the payment to the plaintiff of \$3000 by way of annual allowance, and requiring the defendant to give security for the payment thereof, etc., ordered, that whenever the right of appeal shall have been determined, either by lapse of time, affirmance by the court of last resort, or a voluntary waiver of the right to appeal, and upon tendering to the plaintiff the required security for the payment of the allowance aforesaid, "then the plaintiff shall execute and deliver to the said defendant a release of any claim of dower in his real estate in such form as any Justice of this court shall settle and approve."

To this part of the decree the plaintiff's counsel excepted, insisting that no provision should be inserted concerning dower, or if any, that such provision should do no more than give the plaintiff her election, when her right to dower should become absolute by her surviving her husband, whether she will take such dower, or continue to receive the allowance now ordered in lieu thereof.

We cannot resist the conviction, that the court erred in forcing upon the plaintiff this condition. According to the face of the decree, the court, upon the pleadings alone, and upon the defendant's admissions therein, without any proof of the present, or probable prospective income derivable from the defendant's real estate, and without any reference to its possible increase in value and productiveness, or the further acquisitions of the defendant, arbitrarily requires the plaintiff to relinquish all claim to dower therein, and to this the court left her no alternative, unless it be to refuse to take the divorce itself. No doubt the court deemed \$3000 a year of more value to the plaintiff, beginning from the commencement of this action, than her inchoate right of dower, but even the option to decline the alimony ordered, and retain her

right to dower, does not appear to have been tendered to her. As the judgment stands, the divorce is decreed, and she is peremptorily required to relinquish her right of dower. How her release mentioned in the decree is to operate, whether she has such an interest or right as would pass to the plaintiff by a mere release to him so as to exonerate the land, we need not inquire. The object of the decree was clearly to require such a release as should forever preclude any claim of dower in future. We apprehend that it is now well settled, that the right of a wife to dower in her husband's real estate cannot be prejudiced by any act of his.

It was for some time doubted whether, under our statutes, a woman divorced *a vinculo matrimonii* had dower in the real estate of her former husband at his death.

The statute, (1 R. S. 740, 741,) after providing for the endowment of a widow with the third part of all the lands whereof her husband was seized, etc., at any time during the marriage, provides, in § 8, "in case of divorce dissolving the marriage contract for the misconduct of the wife, she shall not be endowed." Chancellor Kent, in his Commentaries, vol. iv., pp. 53-4, and notes, regards this provision as needless, because a divorce *a vinculo matrimonii* always barred the dower of the wife at common law, since "she must have been the wife at the death of the husband."

Similar language, in the statute concerning divorces, (2 R. S. 146, § 47 [48],) provides that "a wife, being a defendant in a suit for a divorce brought by her husband, and convicted of adultery, shall not be entitled to dower," etc. Notwithstanding the apparent implication from the two statutes, that she would be entitled to dower in all other cases than the one expressly named, viz., a divorce obtained against her for her own adultery, or other misconduct warranting such a divorce, Vice-Chancellor McCoun, in *Day v. West* (2 Edwards, 596), says: "where she proceeds against her husband and obtains a divorce *a vinculo*, all right to dower is gone, because of the dissolution of the marriage, and the relation of husband and wife. Since it is essential to dower that the marriage should subsist at the death of the husband, she cannot have dower if not the wife of the man in whose lands she claims it at the time of his death." The reasoning of the court in *Reynolds v. Reynolds* (24 Wend. 198) seems to warrant such a

conclusion, as also *Cooper v. Whitney* (3 Hill, 99); see also *Cherraud v. Cherraud* (1 Leg. Obs. 134), and cases therein cited to the rule of the common law on this subject. But in *Burr v. Burr* (10 Paige, 25-6), the opinion of Vice-Chancellor Willard suggests that such is not the rule under the Revised Statutes; on the contrary, that when the wife obtains a divorce from her husband on the ground of his adultery, she is still entitled, on his death, to dower.

And finally, in *Wait v. Wait* (4 Com. 95), after a full discussion of the subject, it is definitely settled by the court of last resort, that a divorce dissolving the marriage contract on the ground of the adultery of the husband does not deprive the wife of her right of dower in his real estate. We cannot discover, then, upon what ground this decree compelling her to relinquish a right, secured to her by statute, can be sustained. The opinion of the Court of Appeals in the case last cited, shows that the alimony contemplated by the statute is not to be taken as in lieu of dower. In *Burr v. Burr*, also above cited, the fact that the wife, if she survived her husband, would be entitled to dower, was taken into view in the court below, and neither in the Court of Chancery, nor Court of Appeals, was any doubt expressed of the correctness of the Vice-Chancellor's conclusion.

We apprehend that the right of the plaintiff to dower, in the event she shall survive the defendant, is given by statute. That her right to allowance, under the circumstances of this case, (having established her title to a divorce,) is clear, and that the court cannot make the release of her right of dower a condition of granting the divorce, or impose the execution of such a release upon her peremptorily.

It is true that the subject of alimony rests in the discretion of the court, but as said in *Burr v. Burr* (in 7th Hill) that discretion is a judicial discretion and not an arbitrary one, and although the ultimate right of dower in the defendant's real estate, if the plaintiff survive the defendant, may be taken into view in fixing the amount of alimony, there is nothing in the statute which warrants the court in compelling her to relinquish that right, nor has the practice of the court heretofore sanctioned the imposition of any such terms upon the plaintiff.

When the property of the husband consists chiefly of personal

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estate, entirely subject to the husband's disposal in his lifetime, or by will, the inchoate right of dower should properly have little influence on this question; and when, on the other hand, his property consists chiefly of real estate, her dower in which, in the event of her surviving her husband, would be sufficient for her comfortable support, the fact should be deemed entitled to much weight in determining the extent of alimony.

And we have no doubt of the propriety of accompanying the award of alimony with a provision that, in case of the death of the husband, the same may be modified as may be just, in view of the right which will thus become absolute in the defendant to have one-third of the rents and profits of such real estate during the residue of her life. Indeed, we are disposed to adopt the view suggested in some of the cases referred to in the foregoing discussion of the points taken on the defendant's appeal, that the award of alimony is subject to modifications from time to time, as may be just, and that leave should be given, in the decree, to apply for such modifications as the changing circumstances of the parties, and especially the death of the defendant, and the accruing of an absolute title to dower, may render just.

Our conclusion, then, upon this appeal by the plaintiff, coincides with our conclusion under the appeal by the defendant, and is that the decree, so far as relates to alimony and no further, should be set aside, and the parties be permitted a further hearing upon that subject. If, however, the defendant prefers that the decree, so far as relates to the amount of alimony, should stand, then the only modification necessary is to reverse that part of the decree from which the plaintiff has appealed.

CHARLES GOODYEAR, and others v. HORACE H. DAY and EDWIN M. CHAFFEE.

This case turned entirely upon the construction of certain agreements between the plaintiff Goodyear and the defendant Chaffee, and the court held that, by the true construction of these agreements, the plaintiff Goodyear was entitled to the relief sought.

Judgment, overruling demurrer to the complaint, affirmed, with costs.

(Before OAKLEY, CH. J., DUNE and SLOSSON, J.J.)

June Term, 1855.

APPEAL, by defendants, from a judgment at Special Term, overruling demurrer to complaint.

As the judgment of the court, at General Term, proceeded entirely upon the construction which it gave to certain agreements substantially between the plaintiff Goodyear and the defendant Chaffee, nothing more will be necessary to a proper understanding of the grounds of the decision, than a literal transcript of those agreements, all the material facts bearing upon their construction and upon the relief desired by the plaintiffs, being sufficiently set forth in the opinion of the court.

First Agreement.

"This agreement, made by and between Edwin M. Chaffee and Charles Goodyear, witnesseth, that the said Chaffee for, and in consideration of, the sum of three thousand dollars, to be paid to him as hereinafter described and specified, hath sold, assigned, and set over, and by these presents doth hereby assign and transfer all his right, title, in and to the improvements or invention of compounding and mixing gum-lac or shellac with india-rubber, either with or without sulphur, or other ingredients, and heat. And the said Chaffee further agrees to apply with, or in behalf of, said Goodyear for patents in the United States for said invention, at the expense of said Goodyear.

"Said Chaffee further agrees that the said Goodyear may proceed to take out patents in all foreign countries, for his, said Goodyear's benefit, said Goodyear paying the expenses of the same, for said improvements in shellac, and said Chaffee agreeing to execute the necessary papers therefor.

"The said Goodyear, on his part, agrees to pay to the said Chaffee the sum of three thousand dollars upon the following terms, viz.: one-half of the aforesaid sum, or fifteen hundred dollars, at the time of the issuing of a patent for said improvements in the United States, or if a patent should be previously granted as a renewal of his, said Chaffee's, patent for india-rubber machinery, then the aforesaid sum of fifteen hundred dollars shall be paid to the said Chaffee, upon the assignment of said patent for said machinery to said Goodyear, the remaining one-half of said three thousand dollars to be paid within one year from the date hereof.

"In the event of neither of the aforesaid patents being obtained,

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then the first-named sum of fifteen hundred dollars is to be paid within one year from the date hereof.

"The said Chaffee upon his part agrees further, that upon the issuing of one or both of said patents for shellac and machinery, he will immediately assign them to the said Goodyear.

"And it is further mutually agreed that if at that time the aforesaid three thousand dollars shall not have been paid, the said Goodyear shall make such a lien, transfer, or conveyance of his right, title, and interest in said patents to said Chaffee, as shall prevent any valid transfer of any rights or interests in said patents by the said Goodyear, until said three thousand dollars shall be paid by said Goodyear.

"It is further understood, that said Chaffee may reserve to himself the right to use the said india-rubber machinery in any business which he may hereafter carry on; and it is further understood, that if the said patent for india-rubber machinery is not extended, then the whole sum of three thousand dollars shall be paid for, or secured upon, the patent and improvement on shellac.

"In witness whereof, we have hereunto set our hands and seals, this twenty-third day of May, one thousand eight hundred and fifty.

"JAMES A. DORR, Witness."

"CHARLES GOODYEAR,

"EDWIN M. CHAFFEE."

Second Agreement.

"Whereas, I, Edwin M. Chaffee, have lately procured an extension of my patent, dated August 31, 1836, for seven years from the expiration thereof, the expenses of which have been large, by reason of the opposition thereto—but which expenses have not yet been ascertained, and cannot be at present;

"And whereas, said patent, at the time it was extended, stood in the name of Charles Goodyear, and was held for his benefit, and the benefit of those who had a license or who had a right to use his metallic or vulcanized india-rubber, or india-rubber prepared and cured according to, and under his patent, dated June 15, 1844, and re-issued December 25, 1849;

"And whereas, said Charles Goodyear agreed with me, for himself and others using my said patent under him, that they would be at the expense of applying for said extension of said patent, and make me an allowance for the use thereof, in case the same

should be extended, at and after the rate of twelve hundred dollars per annum, to commence on the 31st of August, 1850, and payable quarterly, that is to say, three hundred dollars on the first days of December, March, June, and September, in each and every year during the present or any further extension of said patent, and during any re-issue of the same, and until said patent or any re-issue thereof, shall be set aside as void in the highest court to which the same can be carried ;

“ And whereas, William Judson, Esq., has had the management of said application for said extension, and has paid and become liable to pay the expenses thereof, and agreed to guarantee me the payment of said sums of money, according to the terms, and at the times above specified.

“ Now, I do hereby, in consideration of the premises, and to place my patent so that, in case of my death, or other accident or event, it may enure to the benefit of said Charles Goodyear and those who hold a right to the use of said patent, under, and in connection with, his licenses, according to the understanding of the parties interested, nominate, constitute, and appoint said William Judson my trustee and attorney irrevocable, to hold said patent, and have the control thereof, so that no one shall have a license to use said patent or invention, or the improvements secured thereby, other than those who had a right to use the same when said patent was extended, without the written consent of said Judson first had and obtained.

“ And said Judson, for himself and those interested, agrees with me, said Chaffee, my executors, administrators, and assigns, that the expenses of extending said patent, shall all be paid without charge to me ; and further, that I shall be paid said sums of money at the times and according to the terms above recited ; and said Judson, and those for whom he acts, are to be at all the expense of sustaining and defending said patent, without any charge to me. And it is further expressly understood and agreed, that I am to have the right to use said patent and improvement in any business which I may carry on.

“ As witness my hand and seal, this 5th of September, 1850.

“ EDWIN M. CHAFFEE.”

“ Witness, GEORGE WOODMAN.”

Third Agreement.

“Whereas, it was agreed by and between William Judson and E. M. Chaffee, by an article under hand and seal, and dated the fifth day of September, 1850, which agreement was recorded at the Patent Office, September 11th, 1850, on what terms said Chaffee would continue to hold said patent, for the benefit of said Judson and Charles Goodyear, and his licensees;

“And whereas, in said agreement there was an omission to state, that if said licensees continued to use the improvements in said patent named, they should each one contribute and pay said Judson his proportion of the expenses and services expended in obtaining the renewal of said patent, which it was intended that said licensees should pay under said Judson, in case they continued the use of the said improvements for which said patent was issued, after the extension thereof;

“And whereas, there was no such direct absolute stipulation, on the part of said Judson, to pay said Chaffee the sum of fifteen hundred dollars per annum, in quarterly payments, on the usual quarter days, as said Chaffee claimed, and now insists shall be inserted in said agreement;

“And whereas, it is now agreed by said Chaffee and said Judson, that said agreement shall be so modified as to secure the objects more fully intended to be secured by said agreement.

“Now it is agreed, that the said licensees shall each pay his share of the services and expenses to said Judson, as the condition on which they shall have the license of said Judson to use said improvements; and that on the payment of his or their share, or proportion of the services and expenses aforesaid, said Judson shall be authorized to give each a license to use said improvement, on their paying as aforesaid, severally each for himself, or his firm or company. And said agreement is further so altered that said Judson hereby agrees to pay said Chaffee fifteen hundred dollars, in quarterly payments each year, on the usual and customary quarter days, at the time set forth in the agreement aforesaid, to which this is an addition and alteration, commencing the quarterly payments on the first day of March next. And I agree with said Judson that he may use my name in the commencement and prosecution of all suits he may have occasion to commence, to

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sustain said patent or recover damages for any infringement or infringements thereof, or for any other purpose in relation to the same, or the use thereof, he holding me harmless from any costs, by reason thereof, and he to have all the benefits which may be derived from such suits."

WILLIAM JUDSON, [SEAL.]

EDWIN M. CHAFFEE, [SEAL.]

Sealed and delivered this 12th day of {

November, 1851, in the presence of {

BENJ. H. JARVIS,

Received and recorded Nov. 27, 1851.

J. T. Brady, for plaintiffs.

E. W. Stoughton and Richardson, for defendants.

BY THE COURT. SLOSSON, J.—If the plaintiffs are entitled, on the allegations in this complaint, to any relief against the defendants, or either of them, the demurrer as to such defendants is not well taken, and was properly overruled.

To determine this question, it is necessary, in the first place, to ascertain what rights in the case, as made by the complaint, Goodyear or Judson acquired under the agreements of the 23d of May and the 5th of September, 1850, and the 12th of November, 1851, and whether the interference of this court is necessary or proper to protect or perfect those rights.

These instruments should be read in the light of facts averred in the complaint, and admitted by the demurrer to be true.

When the agreement of the 23d of May was executed, Goodyear was the owner, by purchase, of Chaffee's original patent, and had long been in the use of it, by giving to the licensees of his own patent the privilege, without additional cost, of using it in connection with his own patent. Chaffee was, at this time, in Goodyear's employ, and continued so until after the extension of the patent was obtained.

Judson was, at this time, the attorney, counsel, trustee, and managing agent for Goodyear and his licensees, and had an interest in the latter's patent for vulcanized rubber. He had also in his hands a fund, contributed by Goodyear's licensees, to defray the expenses attending the extension of the latter's patents, and

out of which it was understood by Chaffee, Judson, Goodyear, and his licensees, that the expenses of procuring the extension of Chaffee's patent should also be paid.

Chaffee's original patent was to expire on 31st of August, 1850.

Goodyear, Judson, and the licensees having concluded to apply for an extension of Chaffee's patent, Goodyear and Chaffee entered into the agreement of the 23d of May, 1850, and Judson then made the application, acting, as Chaffee well knew, for Goodyear and his licensees.

This agreement recites the sale by Chaffee to Goodyear for \$3,000, payable as thereafter provided, of an invention of his in respect to the mixing of shellac with india-rubber, &c., and stipulates for an application with, or on behalf of, Goodyear, for a patent for such invention, at Goodyear's expense. The \$3,000 was to be paid as follows: \$1,500 when the patent for the shellac invention should be issued, or, if the extension of Chaffee's patent for the india-rubber machinery should be granted before that of the shellac invention, then the \$1,500 was to be paid on the assignment to Goodyear of the said patent for machinery, and the other \$1,500 within one year from the date of the instrument; but if neither patent should be obtained, (meaning, probably, within the year,) then the payment of the first \$1,500 is also deferred to the end of the year.

Chaffee then covenants absolutely, that upon the issuing of one or both of the aforesaid patents for shellac and machinery, he will immediately assign them to Goodyear; and it is then provided that if, at the time of the assignment of said patents, or either of them, (as I understand the expression, "at the time aforesaid,") the \$3,000 shall not have been paid, the amount shall be secured by a lien on the patents, if both were obtained, or wholly on that for shellac, if the patent for the machinery should not be extended, such lien to be created by a transfer, by Goodyear to Chaffee, of his interest in the patent, so that he, Goodyear, could not give licenses until the whole amount was paid.

It is then provided that Chaffee might reserve to himself the right to use the india-rubber machinery in any business which he might thereafter carry on.

I have recited this instrument somewhat in paraphrase, but strictly according to my interpretation of its meaning.

It is a remarkable circumstance, that the \$3,000 seems to be treated in this instrument as the consideration for the assignment of the shellac patent only, and is agreed to be paid for that patent whether the patent for the machinery was extended or not, though the periods of payment are regulated in respect to the time when the extension of the latter patent might be procured. Were not the instrument under seal, a question might be raised, whether there was any consideration to support the covenant to assign, which is a covenant to convey a valuable right and property wholly belonging to Chaffee, and in which Goodyear could acquire no interest, except as purchaser, since it is well settled under the law of 1836, that the right to the extension belongs solely to the original patentee, and not to his assignee of the first patent, whose rights terminate with the termination of the original term. The extension is for the benefit of the patentee, and, in every sense, is a new patent. *Wilson v. Rousseau*, 4 Howard, 646.—(Woodworth's patent.) Curtis on Patents, § 118.

The instrument is, however, under seal; and, apart from that, I am not prepared to say, in view of the inartificial and confused form of the instrument, that the consideration expressed in it was not intended by the parties to apply to both patents, and, in the consideration of the case, shall assume that it was.

What, then, are the rights created by it in Goodyear? Clearly a right, as purchaser, though resting in covenant, to the extended patent when obtained. There are no words of conveyance *in presenti*, because the subject was not in existence, but there is a clear and absolute covenant by Chaffee to make an immediate assignment of the patent whenever it should be issued.

This operated, in equity, to transfer the whole of Chaffee's interest in the anticipated patent, to Goodyear, saving only the right reserved to the former to use it in his own business; and if the rights of the parties depended now solely on that instrument, a court of equity would compel a specific performance of the covenant, if it became essential to the protection of Goodyear's rights, that he should be invested with the legal title to the patent. (2 Story's Eq., § 722; *Field v. Mayor, &c., of New York*, 2 Seld., 179.)

The agreement of the 23d of May was in force at the time the extension of the patent was obtained, (31st of August,) and when the agreement of the 5th of September was executed.

The new patent was, of course, in the name of Chaffee, and he was its legal owner. Judson called upon Chaffee, on the return of the latter with the new patent from Washington, and, without the knowledge of Goodyear at the time, procured from him the agreement of September the 5th, being a deed-poll by Chaffee under seal.

How are Goodyear's rights affected by this instrument? As he was no party to it, it is clear that they could not be affected at all, except by his subsequent acquiescence in it, and then the nature and conditions of that acquiescence became material.

But, apart from his acquiescence, are his rights varied or affected by the terms and stipulations of the agreement itself?

This instrument reveals the existence of another agreement between Chaffee and Goodyear, which does not appear to have been in writing, and which probably was subsequent to the agreement of the 23d of May, by which Goodyear was to be at the expense of applying for the extension, and was to make an allowance to Chaffee for the use of the patent, if extended, at the rate of \$1,200 a year, payable quarterly, during that or any future extension. It recites this outside agreement with Goodyear, and then Chaffee, in consideration of it, and also in consideration that the expenses attending the procuring the extension had been large, and could not then be ascertained, and in consideration that the patent, when extended, (that is, the original patent,) stood in the name of Goodyear, and was held for his benefit, and that of his licensees; and in consideration that Judson had had the management of the application for the extension, and had paid, and became liable to pay, the expenses thereof, and had agreed to guarantee to Chaffee the payment of the annuity at the quarterly periods mentioned in the agreement, and with the declared intent to place the patent so that, in case of his (Chaffee's) death, or other accident or event, it might enure to the benefit of Goodyear, and those who held a right to the use of said patent under and in connection with his licensees, according to the understanding of the parties, nominates, constitutes, and appoints Judson his trustee, and attorney irrevocable, to hold the patent and have the control thereof, so that no one should have a license to use said patent or invention, etc., other than those who had a right to use the same when said patent was extended, without Judson's written consent. Judson then,

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for himself and those interested, (which expression can have reference only to Goodyear and his partners in interest and licensees,) agrees with Chaffee that all the expenses attending the extension shall be paid without charge to him, and that the annuity shall be paid as before stipulated; and that he, (Judson,) and those for whom he was acting, (none other than Goodyear and his licensees, etc.,) should be at all the expense of sustaining and defending the patent; and then follows the reservation stipulated for in the agreement of the 23d of May, to wit, that Chaffee was to have the right to use the patent and improvements in any business which he might carry on.

It cannot be denied that this instrument is, on its very face, a full and clear recognition by Chaffee and Judson of the right of Goodyear, as subsisting and paramount, and to be secured in all events.

It changes the consideration from \$3,000, as an out-and-out payment, to an annuity of \$1,200, and this is expressed to be for the use of the patent. Does that change Goodyear from a purchaser to a mere licensee? I speak now upon the face of the instrument. If by the words, "according to the understanding of the parties interested," in the clause declaring the intent of the instrument, among other things, to be, that in the event of Chaffee's death, etc., the patent should enure to the benefit of Goodyear, etc., be meant the agreement of the 23d of May, (and there is no evidence of any other understanding,) then clearly Goodyear is recognized in this instrument as still invested with all the rights he acquired under the former agreement, and there are other clauses which favor the same view. Then how does it stand on Goodyear's acquiescence in this agreement?

When first informed of the execution of the instrument, a few days afterwards, Goodyear objected to it, and only assented to it upon the assurance, by both Chaffee and Judson, that it was to operate as a fulfilment of (if not a substitution for) the agreement of the 23d of May, and to secure the extension to Goodyear and his licensees, etc., according to the design of the agreement of the 23d of May, and he then acquiesced in it as a substantial, though not literal, performance of that agreement.

In what respect, then, are the rights of Goodyear affected by this agreement, as thus assented to?

I answer, only as to the mode of enforcing and securing them.

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He cannot, perhaps, now ask for the transfer of the legal title to the patent directly to himself, as he might have done under the agreement of the 23d of May.

A trustee, or a person designated by that title, has intervened, and the next question is, What title the trustee has, and whether Chaffee's rights are perfectly secured under the instrument as it stands, and which both Chaffee and Judson declared to Goodyear was intended to secure him his rights, under the agreement of the 23d of May?

The legal title is not in terms transferred to Judson, yet he is declared to be a trustee to hold the patent, so that in the event of Chaffee's death, or other accident, it might enure to the benefit of Goodyear. Judson is to have the control of the patent, so that no one could obtain a license without his written consent. From this restriction, however, is excepted Goodyear, and his licensees, who had the right to use the same when the patent was extended, and to whom the instrument concedes the right to continue the use without a fresh license.

I consider the intention of the agreement of the 5th of September to be, to secure to Goodyear the benefit of the agreement of the 23d of May, but in a different form than that contemplated by the last-named agreement, to wit, by the interposition of a trustee, or person clothed with that character, instead of by a direct assignment of the patent to him; that an additional motive for this intervention of a trustee was, to give Judson, who was responsible for the expenses and annuity, a control over the granting of the licenses, for his own protection, and that the legal title was to be reserved in Chaffee, as a security, in addition to the personal undertaking of Judson, for the payment of the annuity and expenses.

This instrument is not, as is contended by defendants, a power of attorney merely, and revocable at pleasure; the intent of the instrument would be fully expressed, though perhaps not effectuated, without the words "attorney irrevocable."

Yet the words are not without significance; as it was intended that Judson should act as trustee, yet without the legal title, a power to act is superadded, and perhaps necessarily so, but the power follows the nature of the intended trust, and is auxiliary to it and in aid of it, so that if the trust is irrevocable the power is equally so. Moreover, Judson was personally responsible for

the payment of the expenses, and the annuity, and this instrument was, in one sense, a security to him in respect to those obligations on his part; this would make it, viewed as a power of attorney strictly, apart from the trust, a power coupled with an interest, and being by its terms declared "irrevocable," it becomes in fact so. (Story's Ag. §§ 476-7.)

In no respect, therefore, was this a revocable power, at the pleasure of Chaffee, nor, in my judgment, was it revocable, by reason of any stipulations contained in it, in the nature of conditions precedent or subsequent; the payment of the expenses and annuity was a personal obligation on the part of Judson, and his failure to comply with the stipulation in that respect certainly could not, of itself, give to Chaffee the right to abrogate the contract on his own motion. What a court of equity might have done on an application to it, founded upon the default, is another question.

We have, then, this singular state of things under the agreement of the 5th of September: the legal title in Chaffee, the equitable title or beneficial ownership in Goodyear, and some kind of title, either as trustee or attorney irrevocable, for the purposes of a trust, in Judson, with a power on the part of Chaffee and Judson to grant the licenses.

Are Goodyear's rights secured under this instrument according to the declared intent of the instrument itself, and of the parties when his assent to the instrument was procured, or is the instrument, in its present form, inadequate to such declared intent, or is any other instrument or transfer necessary to effect it, and which it is in the power of this court to award?

These are questions to be hereafter considered.

Before proceeding, however, to that subject, it is necessary, as bearing upon the plaintiff's rights, to consider the agreement of the 12th of November, 1851.

This, also, was entered into between Judson and Chaffee without Goodyear's knowledge, or, as far as appears from the complaint, without his having in any way acquiesced in it, other than as a recognition of the agreement of the 5th of September.

The agreement of the 5th of September had provided for the payment of \$1,200 per year to Chaffee, as the consideration for the use of the patent, but, in fact, he had been paid \$1,500 a year

from that time, and one object of the November agreement appears to have been to modify the prior agreement in this particular, and to bind Judson personally to its payment. Another object was to enable Judson to exact from Goodyear's licensees a proportional payment of the expenses of procuring the extension of the patent; and a third was to authorize Judson to use Chaffee's name in suing for infringements, which would seem to be necessary from his retaining the legal title; but such suits were to be at his, (Judson's,) expense, who was to hold Chaffee harmless from the costs, and was to have all the benefits derived from the litigation. The whole agreement is a mere modification of that of September the 5th, which it distinctly recognizes, and in no way impairs, or undertakes to impair, the rights of Goodyear, which it, on the contrary, expressly alludes to as subsisting, and in full force.

These are all the instruments which go to create or affect the rights of the plaintiffs in this extended patent, and what is the effect of the whole?

My conclusion is:—

1st. That Goodyear, for himself and his licensees acquired, under the agreement of the 23d of May, the entire beneficial interest and equitable title to the extended patent, and that that interest has been in no degree divested or impaired by the subsequent agreements, and that under that agreement standing alone, he would have been entitled to have compelled, in this court, an assignment directly to himself of the patent when extended, upon the tender or offer to pay the \$1500.

I do not consider his right to an assignment to have been lost or impaired by his not having made such tender. The assignment and payment were, by the terms of the agreement, to have been made simultaneously on the procurement of the patent, which was on the 31st of August; but before this could be done, or at any rate, before Goodyear could within a reasonable time have made the tender, the agreement of the 5th of September, between Chaffee and Judson, was entered into, by which a new mode of payment was adopted, if, in fact, it was not adopted earlier by the agreement referred to in that of 5th September.

2d. That under the agreement of the 5th of September assented to by him, he has a right, through the medium of Judson as

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trustee, to have the rights acquired by him under the agreement of the 23d of May as effectually secured to him as they would have been by a direct assignment of the patent to himself, consistently with the security created by said agreement in favor of Chaffee for the payment of the expenses and annuity, and in favor of Judson in respect to his personal undertaking for the same expenses and annuity.

To recur, now, to the facts of the case. It appears from the complaint, that Judson, after the 1st of December, 1852, suspended the payment of the quarterly proportions of the annuity stipulated for in the agreement of the 5th of September, (and payable first of March, June, September, and December,) with the intention of inducing Chaffee to renounce his connection with Bourne and Brown, partners of his, under the firm of E. M. Chaffee & Co., and who, it is alleged, were infringers of Goodyear's patent for vulcanized rubber.

On the 18th of June following, (1853,) a suit was commenced against this firm on behalf of Goodyear. On the 23d of June, the same month, Judson wrote to Chaffee to draw on him for the arrears of the quarterly payments which the latter did not avail himself of. Chaffee was apprised of the commencement of this suit, and, as it is alleged, then colluded with Day, defendant in this action, to sell to him the title to the patent.

On the 1st of July following, Chaffee formally, by letter to Judson, revoked the letter of attorney (so called by him) of the 5th of September and 12th of November, on the ground that he, Judson, had failed to perform and keep his part of the agreement, and on the 1st and 6th of July, two instruments were executed between himself and Day, being in substance a purchase from, and sale and transfer by, Chaffee to Day, for \$11,000, of the invention and patent for the residue of the seven years.

In the instrument of the 1st of July, which is the agreement of purchase, the parties expressly recite that they both "claim and believe that Judson, by default on his part, had waived and surrendered all rights, if any, that he might have had, under any and all contracts made with Chaffee."

On the 2d of July, Day gave notice of his purchase to Judson, and after the formal transfer to him of the 6th of July, (how soon after does not appear,) commenced over a dozen suits against Good-

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year's licensees for infringement of Chaffee's patent, the defence of which, at great expense, devolves on Judson.

It is alleged that Day purchased with notice of all three agreements, and fraudulently, and it is contended by the complaint, that the utmost he acquired by the purchase was Chaffee's right to the annuity.

If the allegations of this complaint are true, and they must, under this demurrer be held to be so, so far as they are material, there can be but little doubt that the whole transaction between Chaffee and Day was collusive and fraudulent as against Goodyear and Judson.

We now come to the question which must determine the sufficiency of this demurrer. Does the complaint make out a case which, in any aspect of it, entitles the plaintiffs to the protection or interference of this court? Are Goodyear's rights, as thus shown to exist, sufficiently protected and secured under the agreement of the 5th of September as it stands, without the aid of any additional muniment of title or other protection, and have the plaintiffs any rights, as against Day, as an interloping purchaser with knowledge of, and in fraud of the rights of Goodyear and Judson which this court can enforce?

The question is not what relief ought to be administered in the case, which can only be determined on the final hearing, but what relief may be administered on the facts shown and admitted by the demurrer; and I do not think it need take long to answer the question.

And, first, I consider the transfer to Day as utterly void, as against Judson and Goodyear, and his licensees, and that it is competent and proper for this court so to adjudge it, and to require the instrument of transfer to be cancelled, or a release executed by him, unless the right to the annuity shall be deemed to have passed by it; and, in that case, to restrain by injunction the exercise by Day of any right of license, or any other right, under the transfer, other than the right to receive the annuity.

This outstanding title in Day constitutes a cloud on Goodyear's title, may be used to his abuse, impairs the value of his rights, subjects him and his licensees to perpetual litigation, and it ought, in conscience, to be put out of the way, or restricted in its exercise by the injunction of the court. (2 Story's Eq. §§ 694-5.)

In the second place, I consider on the case as made, that Goodyear has the right to call on this court, in case the transfer to Day should be wholly set aside, to compel a transfer by Chaffee to Judson, with or without Day as a party, as the court may be advised, of all his remaining interest in the patent, so that Judson's title as trustee for Goodyear's benefit shall be perfected, on such terms and with such provisions as shall give to Chaffee and Judson all the security which the agreement of the 5th of September was intended to give them, in respect to the expenses and annuity; nor am I prepared to say that the court may not decree an absolute transfer of the whole legal title to Goodyear himself on such terms of security, as to the annuity and expenses, as may be deemed proper, in case, in its judgment, that should be the most effectual mode of securing the rights of Goodyear, provided Day shall not, by the transfer to him, have acquired the right to the annuity. We fully concur in most of the views expressed by Hoffman, J., in giving his judgment at Special Term, and affirm his judgment, overruling the demurrer, with costs.

I do not wish to be understood that both my brethren concur in all the views I have expressed, in respect to the construction of the instruments in question, especially that of the 5th of September; but in the result, as to the rights of Goodyear under the instruments, and the allegations in the complaint, and the relief to be administered by the court, they do concur.

The judgment at Special Term must be affirmed, with costs.

ESTHER PAYNE v. WILLIAM WOODHULL and JOSEPH S. RIDGWAY.

By the true construction of the act of July 29, 1848, and of other acts of Congress, a widow to whom a pension has been granted for the services of her husband cannot pledge the certificate by anticipation to an agent employed to obtain the pension, to secure to him a compensation for his services.

Such a pledge, no matter to whom made, or for what purpose, is wholly void.

Hence, if the agent refuse to deliver the certificate, upon request, he is liable in an action for the recovery of its value or of damages resulting from its detention.

Judgment, sustaining a demurrer to the answer of the defendant Ridgway, affirmed with costs.

(Before OAKLEY, CH. J., and SLOSSON, J.)

General Term, October, 1856.

Payne v. Woodhull.

APPEAL, by the defendant Ridgway, from a judgment entered upon the decision of Justice Hoffman at Special Term, on the 6th of March, 1856, in favor of the plaintiff.

The case arose upon a demurrer by the plaintiff to the answer of the defendant Ridgway.

The following are the pleadings:—

The complaint of the above-named plaintiff respectfully shows that the defendants have become wrongfully possessed of, and wrongfully detain from the plaintiff, a certain certificate, the property of the plaintiff, dated the ninth day of June, in the year 1853, issued to the plaintiff by the government of the United States, for a pension of three hundred and three dollars and thirty-three cents per annum, under an act of Congress relating to pensions, of the third day of February, 1853.

And this complaint further sheweth, that said pension certificate is of value to the plaintiff; that said pension is payable semi-annually; and the plaintiff, in consequence of the detention of said certificate from her, has been, and is compelled, as each installment of pension becomes payable to her, to forward proof in writing, and by her affidavit, to the commissioner of pensions at the city of Washington, of said detention, in order to draw such installment, in the absence of said certificate, thereby being put to inconvenience, delay, and expense.

Wherefore the plaintiff demands that the defendants may be adjudged to deliver to the plaintiff the said pension certificate, and to pay to the plaintiff damages for the detention thereof, to the sum of two hundred dollars, with costs of this action, and that said pension certificate may be forthwith delivered to the plaintiff.

VAN SCHAICK & DEVEREUX, plaintiff's attorneys.

The answer of Joseph S. Ridgway, one of the defendants above named, by David P. Hall, his attorney, to the complaint in this action respectfully shows to this court:

That the said defendant answering, admits that he has become possessed of a certain certificate, mentioned and described in the complaint herein; but this defendant, further answering, avers that he became possessed thereof in his professional capacity of attorney, and alleges that some time in the autumn of the year one

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thousand eight hundred and fifty-two, this defendant was employed by William Woodhull, one of the defendants above named, then acting as the attorney in fact for the above-named plaintiff, as hereinafter set forth, to procure for the said plaintiff a pension from the government of the United States; that said William Woodhull had been, prior to the time of such employment as aforesaid, to wit: on or about the seventh day of February, one thousand eight hundred and fifty-two, appointed by said plaintiff her attorney, for the purpose, among other things, of obtaining for the said plaintiff a pension from the government of the United States, and that he acted in the premises as such attorney as aforesaid, under and by virtue of a power of attorney in writing, duly made and executed by the said plaintiff on or about the day last aforesaid; and that until the aforesaid certificate was received by the defendant, as hereinafter stated, the said power of attorney continued and remained in full force and effect, not revoked or annulled; that this defendant, in pursuance of such employment, thereafter in the month of April, one thousand eight hundred and fifty-three, presented the claim of said plaintiff for a pension, under the act of Congress, approved February 3, 1853, and that the said claim was allowed, and the aforesaid certificate issued and transmitted by the commissioner of pensions at Washington, D. C., to this defendant at the city of New York, at which last-mentioned place said certificate was received by this defendant, on the thirteenth day of June, one thousand eight hundred and fifty-three, and of which said receipt of said certificate, said plaintiff was within a few days thereafter notified; that there remains due and unpaid to this defendant, on account of his services in the premises, the sum of fifty-five dollars, payment of which has been demanded of and from said plaintiff, and refused; and that this defendant claims as attorney, as aforesaid, to have a lien upon the aforesaid certificate therefor, and the right to retain said certificate in his possession until said sum, with interest, shall have been paid.

And this defendant further answering, denies that he wrongfully detains from the said plaintiff the said certificate, but on the contrary avers that at or about the time the claim of said plaintiff for a pension was presented as aforesaid, it was agreed by and between William Woodhull, attorney for said plaintiff as aforesaid, and this defendant, that inasmuch as said plaintiff was, as it was

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at the time represented, in reduced circumstances, and unable to advance an amount of money sufficient to defray the actual and necessary disbursements consequent upon said application, this defendant should and would advance the same, and that in the event of said claim being allowed, that this defendant should retain in his possession the certificate issued thereupon, until the amount of said disbursements and the fee of this defendant in the premises should have been fully paid and satisfied.

And this defendant, further answering, avers that said certificate remained in the possession of this defendant, and as he is informed and believes, with the knowledge and assent of said plaintiff, from the time it was first received by him as aforesaid, until the seventh day of September, one thousand eight hundred and fifty-three, when this defendant delivered the same to the plaintiff; that the said plaintiff thereupon on the day last aforesaid, made and executed a power of attorney, authorizing William Woodhull, one of the above-named defendants, to receive from the United States Pension Agent, in the city of New York, the installment of pension due to the plaintiff on the fourth day of said September; and that the said plaintiff thereupon, on the same day, returned said certificate to this defendant. And that the said plaintiff then and there agreed to and with this defendant, that out of the installment so to be received, said Woodhull should pay a portion of the amount due this defendant, for the services and disbursements in the premises, and that this defendant should retain in his possession the said certificate, until payment and satisfaction of the entire amount thereof, had been made by the said plaintiff to this defendant.

And this defendant further answering, admits that the said certificate is of value to the plaintiff, and that the said pension is payable semi-annually.

And this defendant further answering, avers that he has no knowledge sufficient to form a belief whether the said plaintiff, in consequence of such alleged detention, is or has been compelled, as each installment of pension becomes payable, to forward proof in writing, and by her affidavit to the Commissioner of Pensions, at the city of Washington, of said alleged detention, in order to draw such installment in the absence of said certificate as in the said complaint it is alleged, or whether the said plaintiff has been,

or is thereby put to inconvenience, delay, and expense, as is also in said complaint alleged, and he therefore denies each and every of said allegations. Thereupon, this defendant prays judgment that the said complaint be dismissed, with costs.

The plaintiff demurs to the separate answer of the defendant Ridgway, because the same is insufficient.

D. P. Hall, for appellant.

Devereux, for respondents.

BY THE COURT. SLOSSON, J.—The question is, Whether a widow, entitled to a pension under the act of February 3d, 1853, (10 U. S. Stats. at large, 154,) can pledge her certificate to the person who acted as her attorney in procuring the pension from the government, as security for the payment of his compensation for such service?

The act of 1853 merely declares that the widows of officers, etc., who were married subsequently to January, 1800, "shall be entitled to a pension in the same manner as those who were married before that date."

The only previous act which regulates pensions to widows, in respect to the period of their marriage, is that of July 29th, 1848, (9 Stats. at large, 265,) which secures the right to widows who had been married before 1st of January, 1800.

By this act, (§ 2,) "any pledge, mortgage, sale, assignment, or transfer of any right, claim, or interest, in any way granted by this act," is declared to be "utterly void, and of no effect," and it is further provided, that the annuities or pensions granted by the act "shall not be liable to attachment, levy, or seizure by any process of law or equity, but shall come wholly to the personal benefit of the pensioner or annuitant entitled to the same."

The defendant contends that the plaintiff having obtained her certificate from the government, it is "property," and, as such, is distinguished from a "right, claim, or interest" in or to a pension, and that being the plaintiff's property, she had as much right to dispose of it by way of pledge, as she would have to dispose of the money when received upon it; and he claims that this construction is apparent from the language of this and other acts on

this subject. Thus, while the act of 1848 declares void any pledge of a right, claim, or interest, in a pension, it exempts from attachment, levy, and seizure, the pension itself. So in the act of July 7, 1838, (5 Statutes, at large, 303), a pledge of any right, claim, or interest in a pension, is declared to be invalid, while the pension itself is declared not to be liable to levy, etc.; and the defendant contends that Congress intended a distinction between the right to an interest in a pension and the pension itself, and that the policy and intention of the Pension Statutes was to protect persons entitled to pensions from their own acts, only during the time in which their right to the pension should remain unascertained, and afterwards from the acts of other parties only.

A careful examination and comparison of the various statutes on this subject has led us to a different conclusion.

Provisions, substantially similar to those contained in the acts of 1838 and 1848, both of which are confined to the case of widows, are to be found in almost all the pension acts, and to our minds it is very apparent that Congress intended, in all these cases, to secure the benefit of its bounty to the pensioner personally, and to place it wholly not only beyond the reach of creditors, but beyond the consequences of any act of his own to which he might be tempted from necessity, weakness, or improvidence. Thus, in the first of the pension acts, 23d March, 1792, (1 Statutes, at large, 245,) it is declared that "no sale, transfer, or mortgage of the whole, or any part of the pension, or arrearages of pension, payable to any soldier, or before the same shall become due, shall be valid; and every person claiming such pension, or arrearages of pension, or any part thereof, under a power of attorney or substitution, shall, before the same is paid, make oath that such power or substitution is not given by reason of any transfer of such pension or arrearages of pension;" and it is declared to be perjury to swear falsely in the matter.

A similar provision is found in the act of April 10, 1806, (2 Statutes, at large, 376, 5, 8.) So by section 4 of the act of March 18, 1818, (3 Statutes, at large, 410,) it is provided that "no sale, transfer, or mortgage of the whole, or any part of the pension, payable in pursuance of the act, shall be valid."

So by section 4 of the act of May 15, 1828, (4 Statutes, at large, 269,) it is provided that "the pay allowed by the act shall not in

any way be transferable or liable to attachment, levy, or seizure, by any legal process whatever, but shall come wholly to the personal benefit of the officer or soldier entitled to the same by the act."

So by section 4 of the act of July 4, 1836, (5 Statutes, at large, 128), providing for half-pay to widows of officers, or who have died in the United States service since 1818, it is declared that any pledge, mortgage, sale, assignment, or transfer, of any right, claim, or interest (the words used in the act of 1848) in any money or half-pay granted by the act, shall be utterly void and of no effect;" and then it is provided, that where the application for the money is made by the attorney, such attorney, before a warrant shall be delivered to him, shall make oath that "he has no interest in said money by any pledge, mortgage, sale, assignment, or transfer, and that he does not know or believe that the same has been so disposed of to any person whatever."

So by the act of July 7, 1838, before referred to, it is declared that a sale or pledge of any right, claim, or interest, in any pension or half-pay, is invalid, and the pension and half-pay are declared to be exempt from any liability to levy, etc., but to come wholly to the personal benefit of the pensioner or annuitant; and where the pensioner applies for payment by attorney, such attorney is to make oath "that he has no interest in said money by any pledge, surety, transfer, agreement, understanding, or arrangement, and that he does not know or believe that the same has been so disposed of to any other person."

We think these various provisions speak a very plain and intelligible language, and indicate a uniform and consistent policy in the legislature which enacted them; and when it is considered that these pensions are payable annually, and designed for the benefit of a needy, aged, and in many cases, feeble and helpless class of persons, it is quite apparent that Congress never intended, in these various provisions, any such distinction between the right to a pension to be granted and the pension itself when granted, as is contended for, and that the words "right, claim, or interest," are to be taken in a distributive sense, and to mean that no portion or share of, or interest in a pension already granted, as well as no right in a pension to be granted, shall be sold or hypothecated by the beneficiary. Indeed, the language of the act of 1848

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seems to admit of no other construction ; it is, that no pledge, etc., of any right, claim, or interest, in any way granted by this act, shall be valid. The right granted is to receive so much money a year by way of pension, and the interest of the annuitant in the grant is the property which he has in such right, that is, in the pension itself. The right to have a pension declared in her favor, as coming within the class of pensions described in the act may be included, but to restrict it to that would, in our judgment, be doing violence to the good sense and evident policy of the statute itself.

On the whole, we think clearly that the agreement, by way of pledge, set out in the answer, comes within the prohibition of the statute, and that the demurrer was, therefore, well taken.

Judgment at Special Term affirmed.

ORASMUS EATON, URI GILBERT and EDWARD O. DATON v.
WILLIAM H. ASPINWALL.

Under the act of April 12, 1852, for the incorporation of ocean steam companies, it is not a pre-requisite that the payment of the ten per cent should be stated in the certificate which is to be filed. It is a matter to be proven, when necessary, as a fact.

It was found, as a fact in the case, that the ten per cent. had not been paid in, upon the incorporation of The Mexican Ocean Mail and Inland Company. It was also found, that the seventh section, directing a certificate to be filed within thirty days after the last installment had been paid, had not been complied with.

Upon the testimony in the cause, it was concluded that the defendant had avowed himself to be a stockholder in the company above named, had registered himself as such upon the books, and taken part in the management.

Held, that it was not competent for him to allege against a creditor, that the company had never been legally constituted, by reason of the omissions or default above noticed.

A debt was incurred by such company, to the plaintiffs, during the period that the defendant was a stockholder. A judgment against the company was obtained, and execution returned unsatisfied.

Held, that the defendant was liable for the demand, and that his liability was not restricted to the amount unpaid upon his stock, but was, under the 6th section of the act, for the whole amount of the stock held by him, for all debts contracted until the certificate has been filed.

(Before OAKLEY, CH. J., HOFFMAN and SLOSSON, J.J.)

General Term, October, 1856.

APPEAL from a judgment, entered upon the report of a referee, in favor of the plaintiffs.

The cause having been at issue upon the complaint and answer, an order of reference was made to a referee to hear and determine the whole action.

He found, by his report, the following facts and conclusions:

That on the eighth day of January, one thousand eight hundred and fifty-three, seven persons filed in the office of the clerk of the city and county of New York, and a duplicate thereof in the office of the secretary of state, under and in pursuance of an act of the people of the state of New York, entitled "An Act for the incorporation of companies formed to navigate the ocean by steamships, passed April 12th, 1852," a certificate made and signed by themselves and others, and acknowledged before a commissioner of deeds by themselves, stating, among other things, that those who signed said certificate did thereby form themselves into a corporation to be called the Mexican Ocean Mail and Inland Company, for the purpose of building for their own use, equipping, furnishing, fitting, purchasing, chartering, navigating, and owning vessels, to be propelled solely or partially by the power or aid of steam, or other expansive fluid or motive power, to be used in lawful commerce and navigation upon the ocean and seas, and for the transportation of passengers, freight and mails, and for holding other property. The principal office for managing the affairs of the company being the city of New York, and stating particularly the ports between which such vessels were intended to be navigated; and that the capital stock of the company should be one million five hundred thousand dollars, to be divided into fifteen thousand shares of one hundred dollars each; that the term of the existence of said company was to be twenty years from the first day of January, one thousand eight hundred and fifty-three; that there were to be nine directors, and stating their names, who should manage the concerns of said company for the first year.

The undersigned has also found, as matter of fact, that ten per cent. of the capital named has not been paid in:

That said company elected officers, hired an office, and went into operation in January aforesaid:

That on the twenty-eighth day of March, one thousand eight

hundred and fifty-three, the defendant became the owner of two hundred and fifty shares of the stock of said company :

That in April of the said year the said company employed the plaintiffs, who were copartners doing business at the city of Troy, under the firm name of Eaton, Gilbert & Co., to furnish coaches and fixtures for said company, which were made and delivered to said company by said plaintiffs, for which said company, by its company name, and by its president, gave the plaintiff two promissory notes, each for the sum of twelve hundred and twenty-one dollars and thirty cents ; one dated September 17, 1853, payable four months after date, and the other dated September 22d, 1853, payable six months after date ; and a third promissory note for the sum of \$1214⁴²/₁₀₀, dated September 22d, 1853, payable five months after date :

That a judgment was obtained upon said notes in the Supreme Court of this state, in favor of said plaintiffs, against the Mexican Ocean Mail and Inland Company, on the thirtieth day of June, one thousand eight hundred and fifty-four, for the sum of three thousand seven hundred and fifty-eight dollars and eighty-three cents :

That on the last-mentioned day an execution was issued, upon the said judgment, to the sheriff of the county of New York, which was returned, wholly unsatisfied, on the fifteenth day of July, one thousand eight hundred and fifty-four :

That the certificate required by the seventh section of said act of April 12th, 1852, has not been made, signed, sworn to, or recorded :

That the defendant continued to be a stockholder in said company, and the owner of said two hundred and fifty shares of stock, during the period when the above-named liabilities in favor of plaintiffs were contracted and accrued, and as such stockholder has taken part in the management of the company :

That as matter of law, the omission to pay in ten per cent. of the capital stock of said company is not a defence to the defendant, in the action against the claim of the said plaintiffs :

That the said plaintiffs are entitled to recover from the defendant the amounts of the said several promissory notes, with interest from the time when they respectively became due ; amounting altogether at the date of this report, to the sum of four thousand

and ninety-eight dollars and thirty-four cents, besides their costs of this action.

In addition to the facts thus found, the following are of importance: The seventh article of the association provided, that it should be the duty of the secretary or treasurer, under the direction of the directors, to issue scrip to those who shall be entitled to stock in the company, when ten per cent. upon the whole amount of capital stock subscribed shall have been paid in thereon, which scrip shall be signed by the resident presiding officer of the company, and countersigned by the secretary or treasurer.

The eighth article provided that it should be the duty of the secretary or treasurer to endorse upon the scrip, which shall be held by any stockholder, every sum which shall be paid thereon, and whenever the capital stock of the said company shall be paid in, certificates of full stock shall, in like manner, be issued, according to the by-laws of the company, and the scrip aforesaid shall be cancelled.

The articles of association were dated the 1st of January, 1853, and the certificate filed the 8th of that month.

Various provisions of the statute, under which the association became a corporation, are noticed in the opinion of the court.

Van Vorst, for the plaintiffs and respondent,

Everts, for defendant and appellant.

BY THE COURT. OAKLEY, CH. J.—The articles of association, under which The Mexican Ocean Mail and Inland Company was formed, were dated the 1st of January, 1853, and a copy of such articles was filed in the office of the clerk of the county of New York, and a certified copy of the same was filed with the secretary of state on the 25th of January, 1853.

This was a sufficient compliance with the first section of the act of April 12, 1852, directing the filing of a certificate in writing, in order to the incorporation of ocean steam companies.

But by the second section of such act it is provided, "That when the certificate shall have been filed as aforesaid, and ten per cent. of the capital named paid in, the persons who shall have signed and acknowledged the same, and all others who may there-

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after be holders of any share or shares of said capital stock, and their successors, shall be a body politic and corporate in fact and in name, by the name stated in such certificate, and shall have and possess all the powers, etc., etc."

It is to be observed that the first section does not require that the certificate shall state the payment of the ten per cent. The strict letter of the second section imports that the corporate character does not arise until the ten per cent. is paid; but then that may be a fact to be ascertained by testimony.

In connection with this section of the statute, the seventh article of the association should be noticed. Scrip was to be issued when ten per cent. had been paid in. Each successive payment was to be endorsed on this scrip, until the whole was paid up, when certificates of full stock were to be issued.

The fourth section authorizes successive calls, by the directors, for payment of installments on the stock; and the seventh section directs a certificate to be filed within thirty days after the last installment has been paid, stating the amount of the capital paid in. This was not done, as the referee finds.

The referee also finds that the ten per cent. was not, in fact, paid in. A witness swears positively that all the stock had been paid up, and much testimony was taken as to the mode in which this was accomplished. We do not propose to enter upon this question, or to scrutinize this transaction. We shall decide the case upon the assumption that the ten per cent. had never been paid in.

There are two prominent facts to be noticed.

First, There is an allegation in the complaint, and an admission in the answer, of no slight consequence. The plaintiff avers that the defendant was a stockholder, and owner of two hundred and fifty shares of stock in the said corporation, to the amount of \$25,000, at the time the coaches were manufactured for, and delivered to, such company, and at the time the notes were given. The defendant admits that he is owner of two hundred and fifty shares of the full shares of said alleged corporation, but puts in issue the allegation of his being such when the debt was contracted.

Next, upon the 28th of March, 1853, the defendant has a transfer made to him, on the stock ledger of the company, by which Rankin, president, transfers to him two hundred and fifty shares.

This book was kept by the company, as the law prescribed. A certificate was on the same day issued and delivered to him, and a receipt given by the defendant for it, to the president.

The tenth section of the statute of 1842, directs a book to be provided, in which shall be entered the names of the original stockholders, and of all transferees, with their residences. This book is to be open to public inspection. In all proceedings under the provisions of the act, such book shall be presumptive evidence of the truth of the contents thereof, but such presumption may be repelled by evidence by any party or person interested in doing so.

There are other pieces of testimony tending to show recognitions, by the defendant, of his character as a stockholder of the company. But we think those we have referred to are enough to raise the legal question. That question is, Whether one who has openly avowed himself a stockholder of a company, registered himself as such upon its books, and as a stockholder taken part in its management, can be allowed to say, as to third persons, that the corporation was never lawfully created?

We answer this question in the negative. We so answer it with greater confidence, when the defect is the omission of an act to be proven by testimony to have been performed, not a pre-requisite to be publicly declared and recorded, before the corporation can acquire a legal entity.

The cases referred to determine, that neither a stockholder who has acted as a director, nor a party incurring a debt to a company can set up as a defence, an irregularity which might show that the corporation never existed, or had incurred a forfeiture. (*McFarlan v. The Triton Ins. Comp.*, 4 Denio, 392; *The Sch. and Sarat Plank Road Comp. v. Thatcher*, 1 Kernan, 108; *Lawrence v. Palmer*, 8 Sand. Rep.; *All Saints' Church v. Lovett*, 1 Hall, 191.)

The principle of these cases must control the present. If a party may not controvert the legality of a corporation when it is enforcing a contract avowedly made with it, he cannot be allowed to defeat a creditor of the company wholly ignorant of the defect or error.

There is a class of authorities decided in England upon the obligations of members of joint-stock associations, which may be usefully noticed. (*Manderby v. Le Blanc*, 2 Carr. & Payne, 409;

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Harvey v. Ray, 9 B. & Cress. 356; *Ellis v. Schmoeck*, 5 Bing. 521; *Doubleday v. Mushell*, 7 Bing. 110, 4 M. & S. 750.)

In these cases, the prevailing principle is, whether the parties have held themselves out as possessing the character, which involves the responsibility? In one case, letters of the defendant, in which he admitted himself to be a shareholder, were held sufficient.

The defendant takes another defence, which should be noticed. The 6th and 7th of his printed points are to the effect, that the liability imposed by the statute is, that each stockholder should be responsible for his contributory share of the capital, and must respond to creditors only for what he has not paid in, and that the defendant had wholly paid up for the stock he held.

But the 6th section of the act of 1852 is express, that the stockholders shall be severally individually liable to the creditors of the corporation to an amount equal to the amount of stock held by them respectively for all debts and contracts made by such corporation, until the amount of its capital shall have been paid in, and a certificate thereof shall have been made and recorded or presented in the next (the 7th) section. That section directs the filing of the sworn certificate thirty days after the whole of the installments have been paid up. This was wholly omitted as before stated.

It seems, to us plain, that even if a stockholder has fully paid up his subscription, or is an assignee of fully paid stock, he is responsible, up to the entire amount he holds, for all debts contracted while he owned the stock.

The case appears to us a clear one, and the judgment must be affirmed, with costs of the appeal.

GEORGE R. BOWDOIN, JEREMIAH LAROCQUE, and others v.
THOMAS J. COLMAN and JAMES MCGREGOR, Jr.

An assignment by a defendant, who prevails in an action of claim and delivery, of the judgment recovered by him, and all moneys to be obtained by means thereof, or by any proceedings to be had thereon, transfers to the assignee any undertaking executed in the action upon requisition made for the delivery of the property to plaintiff; and the assignees may maintain an action upon such undertaking.

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Where, in action upon an undertaking given on the part of plaintiff in an action of claim and delivery, by an assignee of defendants, the undertaking is produced upon the trial, a delivery of it to the promisee pursuant to section 423 of the Code may be presumed.

Upon appeal to the General Term, the court may treat the pleadings as having been amended so as to conform to the facts proved, in any respect in which the court ought clearly to allow an amendment upon application at Special Term.

In an action brought upon an undertaking given upon a requisition in an action of claim and delivery by assignees of only a portion of the original promisees, there is a defect of parties; all the promisees should be represented. But the objection to such defect is taken too late, if raised for the first time upon appeal from a judgment upon a verdict for plaintiffs.

(Before OAKLEY, CH. J., HOFFMAN and SLOSSON, J.J.)

General Term, October, 1856.

APPEAL from a judgment entered upon a verdict in favor of the plaintiffs.

The complaint set forth, that on the 3d of June, 1850, at the city of New York, the defendants executed their certain undertaking in a certain action in the Superior Court, wherein John H. Keyser was plaintiff, and William H. Harbeck, John H. Harbeck, Samuel Ward, Rodman M. Price, and Louis Dietz were defendants, in the following words and figures:—

“SUPERIOR COURT OF THE CITY OF NEW YORK.

“*City and County of New York.*

JOHN H. KEYSER

v.

WILLIAM H. HARBECK, JOHN H. HARBECK, SAMUEL WARD, RODMAN M. PRICE, and LOUIS DIETZ.

} Undertaking of plaintiff's sureties on claim and delivery of personal property.

“Whereas the plaintiff in this action has made an affidavit, that the defendants therein wrongfully detain certain personal property in the said affidavit mentioned, of the value of eight thousand and fifty dollars, and the plaintiff claims the immediate delivery of such property as provided for in the second chapter of the seventh title of the second part of the Code of Procedure;

“Now, therefore, and in consideration of the taking of the said property, or any part thereof, by the sheriff of the city and county of New York, by virtue of the said affidavit and of the requisi-

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tion thereupon endorsed, we, the undersigned James McGregor, jr., of the city of New York, patentee, and Thomas J. Colman, of the same place, broker, do hereby undertake and become bound to the defendants in the sum of sixteen thousand one hundred dollars, for the prosecution of the action of the plaintiff, in the Superior Court of the city of New York, against the defendants for wrongfully detaining the said property, for the return to the defendants of the said property, or so much thereof as shall be taken by virtue of the said affidavit and requisition thereupon endorsed, if a return thereof shall be adjudged, and for the payment to them of such sum as may for any cause be recovered against the plaintiff in this action.

"Dated New York, 3d June, 1850.

(Signed)

"T. J. COLMAN,

"JAMES MCGREGOR, Jr."

The defendant Dietz was not served with a summons, and never appeared in that action.

The firm of Harbeck & Co., appeared and put in a separate defence; and the same was done by Ward & Price. A verdict was taken for the plaintiff Keyser, subject to the opinion of the court at General Term, and that court set aside the verdict and ordered judgment for the defendants. It was then adjudged "that the defendants William H. Harbeck and John H. Harbeck, recover against the plaintiff their costs and expenses, adjusted at the sum of \$382.17; and that the defendants Ward and Price recover against the plaintiff their costs, adjusted at \$395.30, and that the said defendants respectively have execution therefor."

It was admitted, on the trial, that this action (of *Keyser v. Harbeck*, and others,) was the action in which the undertaking was executed. The undertaking was produced in evidence by the present plaintiffs, and it was further admitted by the plaintiffs' counsel, that an action had been brought upon it by William H. Harbeck and John Harbeck, who recovered a judgment for \$474.88 in March, 1855, against the defendants in this action, which judgment the defendant Colman had paid.

In August, 1854, an execution was issued in favor of the original defendants, Ward & Price, against Keyser, for the amount of \$395.30, the costs adjudged to them, and returned unsatisfied.

On the 21st of March, 1855, Ward & Price executed an instrument of assignment to the present plaintiffs, reciting that they had recovered a judgment on the 17th of July, 1854, against John Keyser for the sum of \$395.50, and assigning and transferring to them "and their assigns the said judgment, and all sum and sums of money that may be had or claimed by means thereof, or on any proceedings to be had thereupon;" constituting them lawful attorneys to sue out executions and take all lawful ways for the recovery of money owing, or to become due on the said judgment; and, on payment, to acknowledge satisfaction or discharge of the same. When the plaintiff rested, the defendants' counsel moved to dismiss the complaint on the grounds sufficiently stated in the opinion of the court. The motion was denied, and the counsel excepted; no testimony being given on the part of the defendant, Mr. Justice Slosson directed the jury to find a verdict for the plaintiffs. To this direction the defendants' counsel excepted. The cause was now heard upon a case containing the evidence and exceptions.

E. Pierrepont, for the defendants, appellants.

J. Larocque, for the plaintiffs.

BY THE COURT. HOFFMAN, J.—There are three questions involved in this case:

1st. Whether the right of Ward and Price to sue upon the undertaking passed to the plaintiffs in this action by the assignment of the 21st of March, 1855?

2d. As to the sufficiency of the complaint, and whether the alleged defect can now be taken advantage of?

3d. Whether Ward and Price could have sued the defendants upon the undertaking separately? This question involves that of the effect of the action by John and William H. Harbeck.

I. We think it clear that Rodman and Price, having in fact a distinct judgment for a separate sum, with an award of execution in their favor separately, could assign, and have assigned, this right to the plaintiffs. As against Keyser, the benefit of the judgment passed to them, with every right to recover the demand from him by execution or supplementary proceedings. (Code, § 274.)

We think, also, that the assignment is sufficient to transfer any right which Ward and Price had under the undertaking, that provided for the payment of such sum as may for any cause be recovered against the plaintiff. The sum of \$395.50 is adjudged to be paid to these defendants by the plaintiffs. The assignment transfers that debt which the parties have covenanted to pay. It is a sum of money claimed by means of the judgment assigned, although in form claimed upon the undertaking. When the debt is assigned, the security incidental to it, and given to meet the contingency of its accruing, must follow the debt. The principle is found in those cases which hold that the assignment of a debt secured by a mortgage, passes the mortgage, and in other authorities establishing a similar doctrine in other instances. (*Curtis v. Tyler*, 9 Paige, 432; 10 Smedes & Marshall, 631.)

We conclude, that if the undertaking had been executed to Ward and Price alone, the assignment of the judgment to the plaintiffs would have vested them with all rights under the undertaking.

II. The second question relates to the sufficiency of the complaint. It is objected, that there is no averment of the plaintiff's title to the undertaking, or of their right to bring the action, no averment or proof of a consideration for the undertaking, no averment of a delivery to the assignors, and no averment of facts stated to show that the action in which the undertaking was given, was within the statute.

The decision of the Common Pleas in the case of *Slack v. Heath* (1 Abbott's Pr. Rep. 334), which has been cited, is almost precisely in point, and would settle these questions against the defendants. Mr. Justice Woodruff, however, dissented. No proof had been given at the trial, but the case came up on a motion to dismiss the complaint, as not showing a good cause of action, which motion had been denied, and the jury directed to find for the plaintiff. The learned Judge who dissented, stated the question to be, "Whether the Judge was warranted in charging the jury, that upon the admitted facts stated in the complaint, and without even the production of the alleged undertaking, the plaintiff was entitled to recover?" "It seems to me plain, that unless there be enough to show, on the complaint, that the undertaking was given and received under the 211th section of the Code, the

plaintiff has failed to show a cause of action." The defect was in not averring that the bond was taken in and for the prosecution of an action of replevin, now claim and delivery.

Without expressing an opinion upon the point as it was nakedly presented in *Slack v. Heath*, this case presents facts which may authorize a decision consistently with the dissenting opinion. The undertaking was produced at the trial by the plaintiffs; and here a section of the Code, not noticed in the argument, is of some moment. The 423d section directs that an undertaking in cases of claim and delivery, shall be delivered by the sheriff to the parties respectively for whose benefit they had undertaken. A delivery enjoined by law may be inferred. This meets one of the defendants' points.

Again, it was admitted on the trial, that the action in which the undertaking was given, was the action of *Keyser v. Harbeck and others*; and the pleadings, proceedings, and judgment in that action are in evidence here, that that was an action of claim and delivery. The case, then, as made upon the evidence combined with the complaint, answers the objection in point of fact, assuming it to have been a valid one upon demurrer. The 173d section of the Code appears, then, to apply, and to sanction an amendment so as to confirm the pleading to the proofs. We cannot doubt that if the plaintiff had applied at the trial to amend his complaint by inserting an allegation, that the undertaking was given in an action of claim and delivery commenced under the 206th section of the Code, and was given pursuant to the 209th section, the Judge would have been bound to permit it. The question is, Whether, on appeal, the General Term may not order it or treat it as done?

The 173d section of the Code provides that the court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceeding by, etc., or when the amendment does not substantially change the claim or defence, by conforming the pleading or proceeding to the facts proved.

Raynor v. Clarke and Lawrence (7 Barb., 582), and *Clark v. Daly* (20 Barbour, 67), are instances in which the power of the General Term to amend was asserted and exercised.

In *Bate v. Graham* (1 Kernan, 137) the court says: "If the

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complaint had been demurred to for not stating facts sufficient to constitute a cause of action, we do not see how it could have been sustained." The defect was, that a creditor brought an action to set aside an alleged fraudulent sale of personal property by a testator, without averring that the executor refused to impeach or support it. The answer of the executor supplied the defect, insisting that the sale ought not to be set aside; and the Court of Appeals held, that the defect should be deemed supplied under the 173d section, on the ground that the court below should have permitted or ordered an amendment.

In *Brown v. Colie* (1 E. D. Smith's Rep. 270) the Court of Common Pleas express the opinion that the General Term, as a mere appellate tribunal, ought not to order amendments of this nature, and this in a case in which it thought that an application at Special Term, after a referee's report, would have been successful; and this we understand was its general rule.

The 148th section of the Code, indeed, permits an objection that the complaint does not state facts sufficient to constitute a cause of action, to be taken in some other way, and at some other state of the cause, than upon demurrer or answer; the omission so to take it is not a waiver. It might have been taken formerly by motion in arrest of judgment. This proceeding is not now allowable in practice; but we will assume that it is an objection which may be taken on appeal from a judgment (7 Barbour, 582).

We may also notice the 172d section, by which, after the decision upon a demurrer, either at General or Special Term, the court may allow the party to amend upon terms.

The general tenor of the Code, undoubtedly, is, to consider, upon an appeal, the General Term as simply a revisory tribunal, to act upon the record or case as it finds it; and to affirm, reverse, or modify the judgment or order in the respect mentioned in the notice of appeal, and as to any or all the parties. It possesses, also, the additional power of reviewing any intermediate order involving the merits and affecting the judgment.

But the decision of the Court of Appeals seems to warrant this court, as it would that court, to consider the amendment suggested as in fact made, or to disregard the defect. If the counsel of the plaintiffs considers himself safe under that authority, he may take an affirmation of the judgment at once. We do not consider

ourselves as warranted in reversing it upon the ground suggested. If the counsel should deem it prudent to apply for an amendment at Special Term, he can do so, and have the affirmance of the judgment here suspended.

The next question is, Whether the plaintiffs can sue upon this undertaking without making the other obligees or promisees parties? The leading cases upon this point, irrespective of the Code, are as follows:—*Engs v. Donnithorne* (2 Burr. 1190); *Forsbie v. Park* (12 Mees & W. 146); *Knightly v. Watson* (3 Ex. Rep. 716; Shepard's Touchstone, by Preston, 166); *Ehle v. Purdy* (6 Wend. 629); *Dean v. Hitchcock* (2 Com. 388). See, also, the authorities cited in Platt on Covenants, 123, et seq. Lord Mansfield, in the case from Burrows, says, "The language of severalty or joinder, and not the interest, is the test of the quality of the covenant quoad covenantors." And the same rule governs as to covenantees. "It has been held in a series of cases," says Mr. Parsons, "that the interest which the covenantees take by the covenant, quite irrespective of the words severalty and joinder, is the decisive test." But the correct rule, as stated by Mr. Preston, is that by express words, indicative of the intention, a covenant may be joint, or joint and several, to or with the covenantors or covenantees, notwithstanding the interests are several. Where the words are ambiguous, they will be construed according to the interest.

In *Knightly v. Watson* (3 Ex. Rep. 716) Pollock, Baron, said: "The rule is, that a covenant cannot be treated as joint or several at the option of the covenantee. If a covenant be so constructed as to be ambiguous, that is, so as to serve either the one view or the other, then it will be joint if the interest be joint, and it will be several if the interest be several. On the other hand, if it be in its terms unmistakably joint, then, although the interest be several, all the parties must be joined in the action. So if the covenant be made clearly several, the action must be several, although the interest be joint. It is a question of construction. See also, *Ehle v. Purdy* (6 Wend. 629). In *Pearce v. Hitchcock* (2 Com. 388), upon an attachment under the absconding debtor act, the defendant executed to the plaintiffs, and Peter V. Lane, William B. Guild, and Ziba N. Kitchen, (three other creditors who had come in under the attachment,) a bond in double the amount sworn to by all the attaching creditors, and conditioned

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to pay to each of the attaching creditors the amount justly due to him from said Condit and Peck; the declaration set forth the indebtedness of these parties to the plaintiffs, and concluded with the usual averments of the forfeiture of the bond, etc. On demurrer for non-joinder of all the attaching creditors, the Common Pleas, on the authority of *Arnold v. Talmadge*, (19 Wend. 527,) held the objection fatal. On appeal, Chief-Justice Jewett said, that at the common law the objection would be decisive. He states that the correct rule was laid down by Gibbs, Ch. J., in *James v. Emery* (5 Price, 533), with the qualification stated by Mr. Preston: "That rule is, that a covenant will be construed to be joint or several according to the interest of the parties appearing upon the face of the deed, if the words are capable of that construction; not that it will be construed to be several by reason of several interests, if it be expressly joint. I think that is the true distinction. In this case, although we can see from the recitals in the bond that the obligees had separate and distinct interests, yet it is expressly joint, and the words of it will not admit it to be construed as a several bond. Therefore, by the rule of the common law, the action could not be sustained, if all are living, in the names of any member of the obligees less than all." He then proceeds to determine that the statute (2 R. S. 12, § 57) created an exception to the rule, and enabled the plaintiffs to sue for their separate interests. *Arnold v. Talmadge* is overruled.

Mr. Justice Bronson dissented as to this latter point, but repeated the rule as stated by the presiding Judge, with equal precision. The covenant will be construed to be joint or several according to the interest of the parties appearing on the face of the deed, if the words are capable of that construction; but it cannot be construed to be several by reason of several interests, if it be expressly joint."

I assume, therefore, that upon demurrer to this complaint, the objection would be good. The whole frame of the undertaking is a responsibility to the five defendants named in the title, without a word to import a separate interest, and to treat it as on its face a disjunctive liability, as facts might afterwards occur, would be contrary to sound rules of pleading.

But the objection is one of a non-joinder of proper parties, and admitting it to have been ground of arrest of judgment before the

Code, yet sections 144, 147, 148, apply, and settle that it is too late now to take the objection, as it does not go either to the jurisdiction or to show the entire want of a cause of action.

The remaining point on the part of the defendants, is the effect of the judgment in favor of the Harbecks upon the undertaking, and payment of the amount recovered by them. This is set up in the answer of the defendant Colman as a bar.

If plead as a former judgment, the answer to its availability is, that it is not between the same parties, nor in point of fact for the same cause of action. That cause of action was separated by the judgment of the General Term, and made distinct for one sum in favor of the Harbecks, and for another in favor of the present plaintiffs.

Nor can it be set up as a payment or satisfaction, for the same reason. Another reply is, that had the action been brought in the names of all the promisees in the undertaking, and upon answer or evidence, all the facts now developed had been made out, the judgment could have been in favor of some of the plaintiffs, namely, those recovering, and against the others. (Code, § 274.) The result which would then have been reached is precisely the same as is attained in the present suit.

We consider that the judgment must be affirmed, with costs on the appeal, but the plaintiffs may apply as before suggested, if so advised.

DAVID R. DE WOLF v. THE STATE MUTUAL FIRE AND MARINE INSURANCE COMPANY.

Action upon a policy on freight. The cargo was salt in sacks, and a large portion of the contents was washed out by an accident attributable to the perils of the sea. The sacks were delivered, some entirely, and others partially empty.

Held, that upon the principles of *Nelson v. Stephenson*, (May Term, 1856,) the freight was lost to the ship-owners; that it was nearly an universal rule, that when freight could not be recovered from the shippers, it could be from the underwriters, in a policy.

That salt and sugar were to be deemed soluble articles within the case referred to.

(Before OAKLEY, CH. J., HOFFMAN and SLOSSON, J.J.)

General Term, October, 1856.

De Wolf v. State Mutual Fire and Marine Ins Co.

The action was brought upon a policy of insurance, executed in favor of the plaintiff, by the defendants, upon freight to the amount or sum of \$1,500, upon all kinds of lawful goods or merchandise laden, or to be laden, on board the good British bark *Bessie*, on a voyage from Liverpool, Great Britain, to Alexandria. The policy is in the usual form against "the seas, men-of-war, etc., and all other perils, losses, and misfortunes whatever, whereby the said freight, or any part thereof, shall be lost."

The cargo consisted of three hundred and fifty-four tons of common salt, contained in three thousand five hundred and forty sacks, which were shipped in Liverpool, at the rate of twenty-eight shillings a ton for freight, and five per cent. primage.

The vessel arrived in the Potomac, about twenty-five miles from Alexandria, her destined port, and was there so cut and damaged by the ice that she filled, and lay on her beam ends, when the water flowed in and through her, and a large part of the salt was washed out of the sacks. She was ultimately raised and taken to Alexandria. It was there found that two thousand seven hundred and ninety of the sacks were entirely empty, four hundred and thirty-two were delivered with some salt in them, and three hundred and eighteen were totally lost and destroyed, the sacks themselves not being delivered.

The sum of \$226.88 was paid for the freight of the salt actually delivered, and payment refused for the rest. About thirty-two tons were delivered.

The bill of lading was dated in Liverpool, on the 30th of November, 1854, and was in the usual form.

Judgment was rendered by Justice Hoffman, at Special Term, in favor of the plaintiff for \$1859.07, the amount adjusted by the parties, from which the present appeal is brought.

Young, for the plaintiff.

Moultrie, for defendants.

BY THE COURT. HOFFMAN, J.—In the case of *Nelson v. Stephenson*, (May Term, 1856,*) this court examined the subject of

* Reported 5 Duer, 588.

the relative rights and obligations of shippers and ship-owners as to freight of liquids contained in casks, etc., which have leaked out in whole or in part. The following were the conclusions arrived at:

1st. The owner of liquids shipped in casks of any description is, in the first instance, chargeable with the duty of supplying proper casks, and would presumptively be responsible for a loss arising from their insufficiency or defects. The effect of an unqualified bill of lading is to transfer this presumptive responsibility to the captain and owner of the vessel. They acknowledge by it the good condition of the casks upon their reception on board, and engage to deliver them and their contents as described, in the same condition.

2d. That when the case presents nothing else, if the casks be delivered empty, or nearly so, and the actual cause of the leakage be unknown or conjectural, the owners of the vessel lose the freight for the portion not delivered. They have not performed their engagement. The loss, in these cases, is legally attributable to defective stowage, or some other cause over which the master had control, and for which he has engaged to be responsible.

3d. As, however, a bill of lading, treated as a receipt, is not conclusive, it is open to the ship-owner and master to prove explicitly that the casks were, in fact, unsound or badly made, and, in such a case, the original responsibility of the owner for their condition is restored, and he is bound to pay the freight.

It is an obvious conclusion, from the principles thus laid down, that when the loss of liquids arises solely from the perils of the sea, although the casks are delivered, and it is the case of an ordinary bill of lading, the ship-owner must lose his freight. It is this point which we consider was settled in *Frith v. Barker*, (2 John. Rep. 334).

We consider the principles applicable to all soluble articles, such as sugar and salt. The present case is governed by them.

It was clearly a loss by perils of the sea, attributable solely to that cause, and without a fault of the shipper. The freight was not earned, and could not have been recovered.

It follows, as nearly an invariable result, that if freight cannot be recovered from the shipper or his agent, it is to be recovered from the insurers. It is the contingency covered by the policy.

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Justice Nelson, in *Hugg v. The Augusta Ins. Co.*, (7 Howard, 604,) thus states the rule: "The contract of insurance upon freight is, that the goods shall arrive at the port of delivery notwithstanding the perils insured against, and that if they fail thus to arrive, and the owner is thereby unable to earn his freight, the underwriter will make it good."

The counsel insists that the character of the goods to be taken on board was unknown, and had they been known, the risk would have been declined, or the premium increased. The answer is, that the general words of the policy cover the goods in question, and the underwriters could have controlled the nature of their risk, and amount of premium, by special clauses.

It is also urged that doubts may arise as to what are soluble articles, or where the line shall be drawn between articles delivered in specie, though deteriorated in quality, and articles entirely wasted away. The court will be competent to meet these difficulties when they arise. In the mean time nothing is more apparent than that experienced underwriters can readily frame, what the counsel says the court will have to do, a specification of articles of this description, and a tariff of the rates of premium at which they will consent to take such risks.

We consider that the plaintiff was clearly entitled to the judgment he obtained, which must, therefore, be affirmed with costs.

WILLIAM BARTLETT v. THOMAS CARNLEY, Sheriff of the City
and County of New York.

Goods were shipped aboard a vessel bound to California, and a bill of lading was executed by the master, which ultimately came into the hands of a party in San Francisco, who purchased the goods which it expressed to be shipped.

Before the vessel sailed from New York, the goods were taken by the sheriff under an attachment against the freighter, and against the protest of the master. No indemnity was given by the sheriff or his principals, though demanded. Freight, also, was required but not paid.

The purchaser in San Francisco recovered a sum of money for the omission of the master to deliver the goods according to the bill of lading. The action, which was for the recovery of the goods, was brought by the master, and the goods had been delivered to him under the Code. The only question, therefore, was, whether he was entitled to have damages for their removal?

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Held, that the freighter who removes goods once shipped with a bill of lading delivered, can only reclaim them upon payment of freight, necessary expenses of unloading, and indemnifying the party for any difference between the value of the goods at the port of lading, and what the master or shipowner may be obliged to pay at the port of destination under such bill of lading.

The French and foreign authorities upon the subject were cited and commented upon.

Held, that the act of 1841 (Ch. 242) carried out the principle of general commercial law, and the bond prescribed would cover the damage and loss which the shipowner might incur.

(Before OAKLEY, CH. J., HOFFMAN and SLOSSON, J.J.)

Heard, October 31; decided, November 22, 1856.

THIS action was commenced on the 10th of May, 1851, to recover possession of personal property, viz., of seven barrels of oil and one iron safe, alleged to be held by the plaintiff as a common carrier or bailee, and which were seized by the defendant on or about the 18th of February, 1851. The complaint demands the return of the goods and payment of the damages for the detention.

Under this complaint and the usual affidavit, the goods were delivered to the plaintiff.

The sheriff set up in his answer, that one Lucius F. Reed, being indebted to Flanders & Wright, the latter procured an attachment on or about the 17th of February, 1851, from one of the Judges of the Superior Court, against the property of said Reed, directed to him as sheriff; by virtue of which, he attached the goods in question. He avers that such goods were the property of Reed; that he was the owner thereof, or had a leviable interest therein. He therefore demanded a return thereof, or payment of the value with damages for taking and withholding the same. The warrant of attachment was annexed to the answer.

The plaintiff replied on the 3d of June, denying that Reed was the owner of the goods, or had any leviable interest therein. He says that at the time of the taking he was and is master of the ship *Alert*, then lading in the port of New York, for a voyage to San Francisco; that such goods were shipped on board such vessel on the 7th and 8th of February, 1851, and that he executed a bill of lading to the shipper thereof, whereby he undertook to deliver the goods, with other goods therein mentioned, at San Francisco, unto Schultz and Griffen, or their assigns, they paying

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freight, etc.; that the bill of lading was issued before the issuing of the attachment, and before any claim or demand for such goods; that he is a common carrier for hire and reward, and has bestowed labor and expense about the receipt and custody thereof; that neither the defendant nor Flanders & Wright, have ever tendered to him or to the owners of such ship, any security for the expenses of unloading such goods, and the detention of the ship for that purpose, as is required by the statute in such case provided, nor offered to pay the freight and primage due on such goods, nor offered any indemnity against the claims of the shippers or consignees of such goods.

Prior to June, 1852, a trial had taken place, and a verdict was rendered for the plaintiff, subject to the opinion of the court at General Term. On the 26th of June, 1852, a new trial was ordered, and leave was given to the plaintiff to serve a supplemental reply, and to the defendant to amend his answer, and a commission was allowed to issue to San Francisco, to take the testimony of E. M. Burr; but a condition was imposed in this order, that the plaintiff stipulate in writing, to admit on the trial that the property seized by the sheriff was the property of Lucius F. Reed at the time of the shipment thereof, and that the bill of lading which had been delivered to Reed, had not been transferred at the seizure; and, also, that the shipper and Reed were the same person.

The issues raised by the pleadings were tried before Oakley, Ch. J., and a jury, on the 18th of June, 1856, and a verdict was taken for the plaintiff, subject to the opinion of the court at General Term, and with liberty to the court to fix the amount of damages that either party might be entitled to recover, and with liberty to order judgment for the defendant, or a dismissal of the complaint. The following are the material facts established by the evidence on the trial:

Upon the trial, certain receipts for the goods were produced, signed by one J. L. Roberts in favor of John Brown. The stipulation meets this difference, by admitting that Brown and Reed were the same persons. The oil and safe were taken from the ship by the sheriff three or four days after the delivery of these receipts, which was on the 6th and 10th of February, 1851.

The plaintiff was the master of the ship, and she sailed from

New York in March, 1851. The receipts signed by Roberts were surrendered when the bills of lading were given. The one produced was signed by the plaintiff, and is dated the 11th of February, 1851. It was admitted that the oil and safe were taken on the 18th of February, and that they were worth \$300.

The witness Burr, examined under the order for a commission before stated, proved that his firm of Burr, Matson & Co., were possessed of a bill of lading, described in the interrogatory, as the same as that produced. They were possessed of it in the fall of 1851, and had purchased it from the firm of Reed & Castree. He supposes it to be in possession of his former partners. It was paid for in the fall of 1851. About \$700 was paid. The articles enumerated were delivered except the oil and the safe. For that deficiency, a demand was made on the consignees of the ship, G. M. Shaw & Co., who paid them \$350 or \$400. The precise sum he cannot state. At the time of the purchase, his firm had no knowledge of the attachment upon the goods, or against Reid. The bill of lading was indorsed, as he believes, by Schultz and Griffen.

This testimony was objected to by the defendant.

Judgment was obtained against Reed in the attachment suit, on the 22d of May, 1851, for \$163 damages and costs.

It was proven that the captain refused to aid in the removal of the goods; that the sheriff's officer, with the aid of persons employed by him, effected it; and that the safe and oil were in sight.

It was also proven by the owner of the vessel, that upon the seizure, the captain claimed indemnity for expenses, and for what he should have to pay at San Francisco; also, that the goods had been shipped and freight earned, and claim was made for that. The ship was chartered to E. B. Sutton & Co., for the voyage, and they were entitled to the freight. They were to pay fifty cents a foot.

Wm. H. Leonard, for the plaintiff, argued as follows:

The goods in question being in possession of the plaintiff, as a common carrier or bailee, he had a special property in them, sufficient to maintain an action against any wrong-doer (Code, § 207; Story on Bailments, §§ 93, 94). The defendant was a wrong-doer, he

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had no right to levy the attachment upon the goods in question without executing a bond to the master or owners of the ship, in conformity to the provisions of the statute. (Laws, 1841, chap. 142, § 1.) The plaintiff is entitled to judgment for a return of the goods and the damages which he has sustained.

A. S. Vanderpool, for the defendant, insisted that the defendant was entitled to judgment upon the grounds *inter alia*, that it was his duty upon serving the attachment, to take possession of the goods, and that the statute of 1841 was not applicable to attachments issued under the provisions of the Code.

BY THE COURT. HOFFMAN, J.— We shall assume in this case, that the plaintiff represents every interest which could be affected by the seizure of the property in question, and may recover all the damages resulting from such seizure to any one whose title, or claim, he could possibly represent.

The case is then presented, of goods shipped on board a vessel about to sail, (but which had not yet broken ground,) being seized by a creditor of the shipper under lawful process, and re-landed under protest. What damages can the ship-owner legally demand?

He would be entitled, in the first place, to all the expenses attending the unloading of the goods. In the present instance this labor and expense were borne by the sheriff and his assistants. The master declined to render any service; and the plaintiff has not given any proof of a charge or expense incurred by him. The vessel was not detained in consequence of the defendant's proceedings. By the ordinary rule, the freight to be paid includes the compensation for lading the goods. If freight, or its equivalent, can in this case be recovered, such expenses could not be recovered separately. (*Cutting v. Lyons*, 1 Bos. and Pull. 634.)

These observations dispose of the expenses attending the lading and unloading.

The next question is, whether the plaintiff is entitled to recover the freight he would have earned, had the goods been transported and delivered? It is urged that the shipper would not have been responsible for freight, had he voluntarily withdrawn the goods before the voyage was commenced. "Freight is the price of car-

riage, not of receiving goods to be carried." (Smith's Mercantile Law, p. 185.) Accordingly, in *Blake v. Dixon*, (2 Bos. and Pull. 321,) the Court of Common Pleas determined that, supposing an action would lie for money agreed to be paid beforehand for receiving on board goods to be transported, it could not be declared upon as an agreement to pay freight.

Still, this seems rather an objection to the nature of the demand, and form of the action, than to the existence of a right.

Another class of cases approaches nearer to the present question. Such cases relate to an action for the violation of a charter-party to load a ship, in whole or in part. Damages may be recovered, in estimating which, the benefit arising from taking goods of other persons may be deducted. (Abbott on Shipping, 277; *ck Hetscher v. McCrea*, 24 Wendell, 206.)

In this last case the action was for dead freight. The party had stipulated to fill so many tons of measurement, at a particular price per ton, and failed to do so. The court held, not merely that the master could fill up the deficiency, and thus the price under the charter-party be reduced, but that he was bound to do so if goods were offered. The rule that the charterer was liable for deficient freight was admitted, but was thus qualified. The decision that it is the master's duty to take the new freight has not escaped criticism. (Henderson's Maritime Law, § 193.)

These authorities bear upon the present question, but do not decide it. The withdrawal of goods after they are shipped is a peculiar case.

The subject is governed by express provisions in the French and other foreign maritime codes.

The Rhodian Law condemned, without any distinction, the merchant who withdrew his goods from a ship, to the payment of the whole freight. The *Guidon de la Mer* directed, that if he could not agree with the master he should pay a moiety.

The ordinance of the Marine of France (Art. 6) is, that if a vessel is laden by different shippers, (*a cuillette*,) by the quintal or ton, and the shipper wishes to retire the goods before her departure, he may have them discharged at his own expense, upon paying a moiety of the freight. The 291st Article of the Code of Commerce is to the same effect.

But the hirer of a vessel by a charter-party, that is, of the vessel,

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pays the whole freight agreed upon, whatever quantity of goods he puts in the ship. This distinction has employed the critical acumen of the French commentators to explain and defend it. (Valin. Pothier. Boulay-Paty.)

The Code of Commerce also provides that the shipper shall bear the expense of lading, unlading, and also of relading any other goods which it shall be found necessary to displace, as well as of the demurrage. (Art. 291. See Boulay-Paty *Droit Commercial*, tome 2, p. 380.)

We perceive in these regulations the effort to fix some reasonable rule of compromise and compensation where the service for which freight is strictly due has never been performed, and the shipper, by breaking his engagement, deprives the ship-owner of a probable benefit.

But the English rule appears to be settled in accordance with the Rhodian Law, and makes the merchant responsible for the whole freight of the articles withdrawn. Mr. Abbott says: "A merchant who has laden goods cannot have them relanded and delivered to him without paying the freight, and indemnifying the master against the consequences of any bill of lading signed by him." (On Shipping, p. 531, 4th edition.)

The subject was fully examined in the late case of *Tindall v. Taylor* (28 L. & Eq. Rep. p. 216, Queen's Bench, 1854). The declaration stated that certain goods had been received on board a vessel of the plaintiff's, for conveyance from London to Port Phillip, upon the terms that two months after the sailing of the vessel, freight and primage should be paid in advance. There was an averment that two months had elapsed since the sailing of the vessel, of a demand of the freight and primage, and that the defendant had not paid the amount.

Plea. That after the receipt on board of the goods, and after a reasonable time for the vessel to have sailed, and a reasonable time before she sailed, the defendant demanded a return of the goods, and gave the plaintiff notice that he did not wish the same carried and transported; and required a re-delivery to him, but the plaintiff wholly omitted so to do, and afterwards sailed with the said goods, against the will of the defendant.

Replication. That before the defendant's demand for the delivery of the said goods, two bills of lading had been signed and

delivered by the master, engaging to deliver the goods to B. & Co. at Port Phillip, or their assigns, one of which parts was transmitted to the said B. & Co. by the defendant. That the defendant had not, at any time, paid or offered to pay the freight in the declaration mentioned, nor returned or offered to return the said part of the bill of lading, nor offered to indemnify the plaintiff against any claim or right which B. & Co., or any assignee of the bill of lading, might have.

Rejoinder. That B. & Co. were the agents of the defendant, and the said bill of lading was sent to them by the defendant to be held, and was held by them as such agents, and not otherwise; and that the defendant had always been and continued the legal owner of the goods.

Lord Campbell, in delivering the judgment of the court, said: "We entirely agree to the law as laid down by Lord Tenterden in his treatise," quoting the passage above cited. "By the usage of trade, the merchant, if he re-demand the goods in a reasonable time before the ship sails, is entitled to have them delivered back to him, on paying the freight that might become due for the carriage of them, and on indemnifying the master against the consequences of any bill of lading signed for them; but these are conditions to be performed before the original contract can be affected by the demand of the goods."

"That if any doubt could be raised upon this question, irrespective of the bills of lading, we think the action would still be maintainable. After the master, at the request of the defendant, had signed bills of lading for the goods, making them deliverable to a consignee at the port of destination, one of which bills of lading they had transmitted to their consignee, it is quite clear that the defendants had no right to the re-delivery of the goods at the port of outfit, on merely demanding them. The consignee, though agent of the shipper, might have had authority to indorse the bill to a purchaser of the goods, who, as assignee of the bill of lading, for a valuable consideration, would have become their proprietor, and entitled to demand them from the master."

Referring to *Thompson v. Dening*, (14 Meeson & Wels. 403,) Lord Campbell says: "An action of contract on the bill of lading by the endorsee of the bill might not lie; but in respect of his property in the goods, he might have maintained an action against

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the master for detaining or converting them, and the master would be estopped from denying that he had the goods after the declaration in the bill of lading, on the faith of which the endorsee had bought and paid for them."

Considering the law to be as stated by Mr. Abbott, and sustained by the case cited, we see no valid distinction between the case of an owner seeking to withdraw his goods after a shipment, and that of an attaching creditor taking them. As between the shipowner or master and such creditor, the rights and obligations must be the same.

In this view, then, the statute of 1841 (ch. 242, § 1) may be considered as carrying out the legal rule, and the bond therein prescribed to be given, will furnish security for what the law will oblige the creditor or sheriff to pay. Such bond is conditioned "to pay the owner or master all expenses, damages, and charges, which may be incurred by such owner or master, or to which they may be subjected by unloading such goods from the vessel, and for all necessary detention of such vessel for that purpose." It is also provided, that if such bond be not executed, the goods may be transported and delivered according to their destination, notwithstanding the attachment.

As, then, the liability insisted upon exists upon principles of general law, independently of the statute, we need not inquire whether the latter law remained in force since the Code; or if it has, whether the omission to give the security prescribed affects the attachment; or what other consequences might result from that neglect. The result of our opinion is, that the plaintiff is entitled to a judgment on the verdict for damages to be adjusted.

The admitted value of the goods in New York was \$300, which was received by the plaintiff. He had to pay \$350 or \$400 in San Francisco for the non-delivery of the goods seized here. It is not stated in the case, whether the freight was deducted before such payment was made. The presumption is, that it was. If so, there would be no freight to be paid now; but if otherwise, it is to be allowed. The plaintiff insists upon his right to it, and we have therefore discussed the question.

The counsel agreed that the damages should be settled by one of the Judges who heard the appeal.

The judgment will, therefore, be for the plaintiff, the amount to be adjusted by one of the Judges, upon notice.

THOMAS FLYNN v. MATHEW McKEON.

Although a contract under seal fixes the time for its performance, that time may be extended by a parol agreement.

Parol evidence of an agreement was introduced in the case, to prove a rescission of the sealed contract by mutual consent. When this is admissible, parol evidence to show re-instatement of the contract by like consent, is equally admissible; and the evidence was to that effect.

It is the duty of a vendor to prepare and tender a deed, if he insists upon a specific performance.

When the vendor and vendee have fixed upon a time and place for performance, and the vendee attends, and is prepared to do all the contract requires of him, and the vendor neglects to attend, an action will lie by the vendee to recover the deposit-money paid by him.

(Before OAKLEY, CH. J., HOFFMAN and SLOSSON, J.J.)

October 29; November 22, 1856.

APPEAL from a judgment entered in favor of the plaintiffs, upon a verdict for the sum of \$437.61.

The action was brought upon the following contract:—

“Articles of agreement made and entered into the 27th day of October, one thousand eight hundred and fifty-four, between Mathew McKeon, of New Brighton, Richmond County, State of New York, of the first part, and Thomas Flynn, mason, of the second part, in manner following: the said party of the first part, in consideration of the sum of two hundred and fifty dollars to him duly paid, hereby agrees to sell unto the said party of the second part, all that certain piece or parcel of land, with the building thereon, situate and known as No. 115 East 22d street, in the city of New York, for the sum of three thousand two hundred dollars, which the said party of the second part hereby agrees to pay to the said party of the first part, as follows:

The consideration above mentioned	\$250
Upon the delivery of the deed	950
And the balance by mortgage at seven per cent. interest,	2,000
	<hr/>
	\$3,200

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“And it is further agreed by and between the said parties that the possession of said premises is to be delivered on the first day of November, 1854, and the deed to be delivered on the 15th day of November, 1854, and also, that the mortgage is to bear interest from the first day of November as above, and the said party of the first part, on receiving such payment at the time and in the manner above mentioned, shall, at his own proper costs and expense, execute and deliver to the said party of the second part, or to his assigns, a proper deed for conveying and assuring to him or them the fee simple of the said premises, free from all incumbrances, which deed shall contain a general warranty, and the usual full covenants; and it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties.

“In witness whereof the parties to these presents have hereunto set their hands and seals, the day and year first above written.

“MATHEW McKEON, [L.S.]

“THOMAS FLYNN, [L.S.]

“Sealed and delivered in presence of

The action came on to be tried before Mr. Justice Bosworth, and a jury, on the 6th of February, 1856. Upon the plaintiff's resting, the defendant moved to dismiss the complaint, which motion was denied. The defendant then entered upon evidence.

The cause being ended, the learned Judge charged as follows:

There is no controversy in relation to the amount which the plaintiff is entitled to recover, if entitled to recover at all. It is conceded to be the principal sum of two hundred and fifty dollars, and interest, which together amounts to two hundred and eighty-nine dollars and thirty-seven cents. It is unnecessary, therefore, for you to determine the amount of plaintiff's damages. I shall submit to you certain questions of fact in writing, to each of which you will answer “Yes” or “No,” according as upon the evidence you shall determine the truth to be. The first question is this:

Did McKeon, on the 15th of November, 1854, tender to Flynn the deed shown to the witness Jarvis, and demand of Flynn the payment of nine hundred and fifty dollars, and a bond and mortgage for two thousand dollars?

If you believe the testimony of Jarvis, and that the deed pro-

duced in court is the one which he says was tendered in his presence, this question should be answered affirmatively.

The second question is this:

If you answer "Yes" to the above question, then state whether Flynn unconditionally refused to accept the deed, and pay nine hundred and fifty dollars, and give his bond and mortgage for two thousand dollars?

If Flynn stated no reason for refusing to accept the deed, and pay the nine hundred and fifty dollars, and execute the bond and mortgage for two thousand dollars, your answer to this question should be "Yes." If he made no objections to accepting the deed, except that the lot was not as large as he supposed, but did make that objection, you should give the same answer, as there is no pretence that the deed does not embrace all the land covered by the contract. But if you believe, from the evidence, that he objected to accept the deed, on the ground that the property was encumbered, and was ready to accept and perform on his part, on receiving an unencumbered title, your answer to the question should be in the negative.

The third question is this:

Did either of the interviews at Mr. Dickinson's office, testified to by him, when both him and McKeon were present, take place before the 15th of November, 1854?

This question should be answered in the affirmative, if you believe that the interview took place before the 15th of November, 1854, between the plaintiff and defendant, in which Mr. Dickinson stated, that time beyond that date would be necessary to examine the title; and in which the plaintiff stated that he would not be ready to perform on that day. If that interview was after the 15th of November, you should answer the question in the negative.

The fourth question is:

Was Flynn at the office of Judah & Dickinson on the 4th of January, 1855, for the purpose of and prepared to pay McKeon nine hundred and fifty dollars, and give him a bond and mortgage for two thousand dollars, on receiving a deed of the premises which would convey a good title to them?

If Flynn was at the office of Judah & Dickinson on the 4th of January, 1855, having nine hundred and fifty dollars under his

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power and control to be paid to defendant, and for the purpose of paying it to him and accepting a deed, and executing a bond and mortgage for the two thousand dollars, on being offered a deed which would convey a good and unencumbered title to the premises, this question should be answered in the affirmative.

There is no conflict of evidence as to any other matters of fact necessary to be known, in order to determine the rights of the parties in this action.

On receiving your verdict the court will direct such a judgment to be entered as in its view the law—arising upon the facts, as you shall find them in respect to the questions submitted to you, and upon the undisputed facts of the case—may require.

To each of the questions submitted, except to the second one, the jury, by their verdict in writing, answered “Yes;” and to the second question they answered “No.”

And the said Justice thereupon ordered a judgment to be entered for the plaintiff, for the sum of two hundred and eighty-nine dollars and thirty-seven cents; to which decision and order the counsel of the defendant did then and there except.

Mr. Radcliff, for the appellant.

Mr. Judah, for defendant.

BY THE COURT. OAKLEY, CH. J.—The view we have taken of the case will dispense with any minute examination of many points made by the parties.

The written agreement between them provided that possession should be given on the 1st, and the deed delivered by McKeon, the defendant, on the 15th of November, 1854. It was dated the 27th of October of that year. Two hundred and fifty dollars were paid down by the plaintiff, and he was to pay \$950 more upon the delivery of the deed.

In the first place, we consider it fully settled, that even upon a contract under seal fixing a period for performance, that period may be extended by a parol agreement. In the next place, the jury have found that an interview took place, prior to the 15th of November, at Dickinson’s office, and at that interview it was in substance agreed there, that the time would have to be extended.

We will then suppose, that the jury had answered the second question put to them by the Judge, without a word of qualification ; that is, that they had answered that Flynn unconditionally refused to accept the deed and pay the \$950, and give his bond and mortgage. The defendant says, that they could find nothing else upon the evidence.

Upon that assumption, the case is presented of a parol agreement between the parties, that the agreement should be treated as at an end, and each of them discharged. If parol evidence is competent to establish such a mutual rescission, the same evidence is competent to prove a subsequent re-instatement of the contract. Such evidence exists in the case, and is decisive.

The Judge stated that there was no conflict of evidence as to any other matter of fact necessary to be known, in order to determine the rights of the parties, than those he had submitted ; and this leaves the testimony of Dickinson uncontroverted. That testimony proves that negotiations for fulfilment of the contract were resumed and carried on after the 15th of November ; several days were fixed by the defendant for that purpose, and finally, the 4th of January, 1855, definitely agreed upon.

On that day, the plaintiff and his associate in the purchase, Fogarty, attended at Dickinson's office, and the jury have found, that the plaintiff was there for the purpose of, and prepared to pay, McKeon \$950, and give him a bond and mortgage for \$2000 on receiving a deed of the premises, which should convey a good title. The defendant neglected to attend.

The question comes then to this, Whether the plaintiff was bound to do more than he has done or was prepared to do, as found by the jury. It is said he was to make an actual tender of a deed to be executed by the defendant, and an actual tender of his own bond and mortgage.

The English practice, requiring the vendee to tender a deed, has never prevailed in this state. It is naturally the duty and office of the vendor to have it prepared.

The cases are collected in "Sugden's Law of Vendors," p. 247, to which should be added *Wells v. Smith* (2 Ed. Ch. Rep. 78, and 7 Paige, 22, on appeal).

In our opinion, there is nothing in any of the cases in our own court to interfere with the proposition, that where a vendor and

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vendee have expressly fixed upon a time and place to fulfil a contract, and the vendee attends and is prepared to do all that the contract calls upon him to perform, and the vendor does not attend, an action will lie by the vendee to recover the deposit-money paid by him.

Judgment affirmed, with costs.

SAMUEL P. TOWNSEND v. THE EMPIRE STONE-DRESSING COMPANY, CHARLES ABENETHY, and THE MASTERTON, SMITH, and SINCLAIR STONE-DRESSING COMPANY.

An executed parol agreement, upon a sufficient consideration, may operate to discharge the stipulations of a sealed contract.

Held, upon the evidence, that such a discharge or waiver was established, by which a claim for damages in supplying the stone for a building (which was provided for in the contract) was surrendered upon a new agreement.

The plaintiff had delivered to a third party, a bond and mortgage in a specified sum, to be held as security for the payment of the contract price of stone to be supplied under a contract. The defendants subsequently supplied other stone, under a separate agreement, and the defendants alleged, that it was orally agreed, that the mortgage should stand as security for such further supplies. The amount was ascertained and reported by the referee.

Held, that assuming the evidence satisfactory, parol evidence of such an extension of the mortgage was inadmissible.

The English and American authorities bearing upon the point examined. The doctrine of tacking, in its less technical sense, and as between the debtor and creditor, not repugnant to justice.

The English cases of various classes:—

1. Of bills to redeem, where the forfeiture being absolute at law, the court has refused its interference, except upon payment of the demands justly due. This was held in the early cases, but it is doubtful whether it is now the law.
2. Cases of mere equitable mortgages, where the whole principle rests upon the intention resulting from an advance of money, and deposit of title-deeds. This peculiar equity appears to be unknown in our state, probably from the operation of the registry acts.
- 3d. In another class, the question arises between the heir or devisee, and the mortgagor; then when there are legal assets, a bond creditor formerly, and a simple contract creditor of late, may unite his demands. The reason is, that the land has become subject to a lien in his favor.

In our state a mortgage for a definite sum may stand for the advances subsequently made up to the specific amount; but it cannot be held to secure that sum fully, and be subsequently extended by a parol agreement to a further additional sum.

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Although a judgment was recovered for the amount of extra supplies, in favor of the defendant in the action, *held*, that he could insist upon retaining the lien of the mortgage until it was paid, but was only entitled to the usual legal remedies of a judgment creditor.

(Before OAKLEY, CH. J., HOFFMAN and SLOSSON, J.J.)

October 2; November 22, 1856.

APPEAL from a judgment entered upon the decision of a referee, against the plaintiff, for the sum of \$4097, in favor of the defendants, the Masterton's Company, and for costs in favor of the other defendants.

The plaintiff entered into an agreement under seal, with the Empire Stone-Dressing Company to furnish and deliver to him brown stone, cut and dressed as required by plans and specifications furnished by the plaintiff to them at the price of \$26,000, said stone to be delivered at the corner of Fifth avenue and Thirty-fourth street, in the city of New York, and to be furnished as fast as the same should be required in the erection of the buildings about to be put up there by the said party of the second part, according to said plans and specifications. The contract contained the following clause:—"And the said party of the second part, in consideration of the foregoing agreement, hereby agrees to pay said party of the first part for said stone to be furnished and delivered, the sum of twenty-six thousand dollars in manner following; that is to say, the sum of sixteen thousand six hundred dollars in a warrantee deed of sixteen lots of ground, situate, lying, and being in the nineteenth ward of the city of New York, on the southerly side of Forty-sixth street, between Fifth and Sixth avenues; said lots to be estimated at the value of one thousand nine hundred and fifty dollars each, and being subject to a mortgage of fourteen thousand six hundred dollars, the payment whereof is to be assumed by the grantee; said deed to be executed by the said party of the second part and his wife, and to be delivered to said party of the first part, or to such person or persons as said party of first part shall designate and appoint simultaneously with the execution and delivery of this agreement.

"The further sum of nine thousand four hundred dollars, in an assignment of four bonds secured by mortgages upon property on Thirty-sixth street, in said city of New York, one bearing date the twentieth day of May, in the year one thousand eight hun-

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dred and fifty-two, and executed by John C. Bunting of Newark, New Jersey, to the said party of the second part, for the sum of two thousand three hundred and fifty dollars; another bearing date the twentieth day of May, in the year one thousand eight hundred and fifty-two, and executed by John C. Bunting of Newark, New Jersey, to the said party of the second part for the sum of two thousand three hundred and fifty dollars; another bearing date the twentieth day of May, in the year one thousand eight hundred and fifty-two, and executed by John C. Bunting of Newark, New Jersey, to the said party of the second part for the sum of two thousand three hundred and fifty dollars; and another bearing date the twentieth day of May, in the year one thousand eight hundred and fifty-two, executed by John C. Bunting, of Newark, New Jersey, to the said party of the second part, or such person or persons as said party of the first part shall designate and appoint simultaneously with the execution and delivery of this agreement.

“And it is hereby further agreed by and between the parties to these presents, that the said party of the first part shall have the option of selling the said sixteen lots of ground, or any or either of them at any time before the first day of March, one thousand eight hundred and fifty-four; and in case of such sale to appropriate the proceeds without regard to said estimated value, but the said party of the second part shall not be held responsible for any deficiency in such proceeds should said lots be sold at less than said estimated value.

“And it is hereby further agreed by and between the parties to these presents, that in case the said lots, or any or either of them shall remain unsold on said first day of March, in the year one thousand eight hundred and fifty-four, that the said lots so remaining unsold, shall be reconveyed to said party of the second part for a sum equivalent to the said estimated value of nineteen hundred and fifty dollars each, with interest from the date hereof, and all taxes and assessments paid thereon in the mean time; and that said sum shall be paid by said party of the second part, either in cash or at his option, in his two promissory notes of equal amounts, bearing date on the first day of March, one thousand eight hundred and fifty-four, and payable, respectively, with interest, in three and six months from date, to the order of said

party of the first part, payment of said notes at maturity to be secured by a collateral bond and a mortgage on the premises so re-conveyed.

“ And the said party of the second part further agrees, that, in assigning the bonds and mortgages hereinbefore mentioned, he will guarantee the payment of the same at the time and in the manner expressed in the conditions of said bond, it being, however, understood, that interest on the amount of said bonds and mortgages shall be allowed to said party of the second part until the building to be erected by him, shall have been enclosed.

The complaint sets forth the agreement, and states that none of the lots had been sold on the 1st of March, 1854; that the plaintiff executed his notes, to the number of fourteen, payable in three and six months, secured collaterally by a bond and mortgage on twelve lots of land on the northerly side of 45th street, which were duly received by the company in lieu of the mortgage on the sixteen lots; that such bond and mortgage were delivered to Charles Abenethy, selected to take and hold the same; that the whole of such notes had been paid at maturity, whereby the whole amount due on the original contract had been over-paid, and the plaintiff had become entitled to a full satisfaction and discharge of the mortgage; that he had requested Abenethy to execute such discharge, which he had refused to do.

The complaint set forth, as another cause of action against the company, that stone had not been furnished as it was required by the contract, but the company had been grossly in default; and by their delay the plaintiff had been put to great expense, and suffered damages to the amount of \$12,000. Also, that a portion of the stone supplied was not of the thickness required, and avers that damages had been sustained on that account to the amount of \$4,000.

The plaintiff demanded judgment that Abenethy be ordered to satisfy the mortgage, with damages for his refusal; and that the company pay the damages incurred.

The defendants, The Masterton, etc., Stone-Dressing Company, as assignees of the contract, set up in their answer, *first*, that The Empire-Stone Dressing Company had furnished the stone in the manner, at the times, and of the quality prescribed by the contract. *Second*, that on or about the 6th of April, 1854, the

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plaintiff, for a good and valuable consideration waived and abandoned all his demand for damages sustained or to be sustained by reason of any neglect or default of the company in executing the contract. *Third*, that on the 1st of March, 1854, the plaintiff was justly indebted to the said company in the sum of \$2,500, for work and supplies over and above the work provided for in the contract; and that the new bond and mortgage were given and received under an agreement that it should stand as security for this extra work as well as the other. They insist that such mortgage is a security for that amount, and also for certain other claims, being in the aggregate \$5,593.90, for which they demand a judgment, as well as that the mortgage be adjudged to stand as security for such claims.

The cause having been referred, the referee reported in substance, that the following appeared to be the material questions in the case, and upon the determination of which the account was to be stated between the parties. He then states the questions and his decision upon them, as follows:—

1st. Was the stone, which was furnished by the plaintiff, of the thickness called for by the agreement?

Answer. It was not; and the plaintiff is entitled, therefore, to a deduction from the amount to be paid by him under the contract.

2d. Was the stone furnished as fast as required?

A. The determination of that question is to me difficult; I am inclined to believe it was not. In view moreover of the testimony of the witness Sandford, I have not deemed it necessary definitely to decide it.

3d. Was the Empire Stone-Dressing Company, or its assignees, bound to set the stone?

A. I think not.

4th. When was the building inclosed?

A. Not earlier than September, 1854.

5th. Did the plaintiff agree to waive, abandon, or discharge any claim against the Empire Stone-Dressing Company for any default to fulfil their contract?

A. In view of the testimony of the witness Sandford, although I am by no means clear as to its admissibility, I believe that the plaintiff did waive any claim for damages arising from the delay to furnish the stone.

6th. Were the bond and mortgage, which were executed and delivered to Abenethy, intended to secure payment for stone furnished and to be furnished?

A. Such I believe was the intention.

He also stated the details of the extra stone supplied and work done, beside that properly under the contract. The total amount was \$2686.94, without interest. The referee then stated the account according to these views, and concluded thus:—"I therefore find, that there is due by the plaintiff, to The Masterton, Smith, and Sinclair Stone-Dressing Company, the sum of \$3647.20; and that upon payment thereof, he is entitled to have the said bond and mortgage discharged in full, and satisfied on record."

"That there is nothing due by the plaintiff to either of the other defendants; and that the defendants are entitled to recover costs against the plaintiff."

To this finding, various exceptions were taken by both parties, and appeals brought. The points involved in such exceptions and appeals, are noticed in the opinion.

Some of the testimony material to the finding of the referee, is also stated in the opinion.

A. Thompson, for the plaintiff.

H. D. Cram, for the defendants.

BY THE COURT. HOFFMAN, J.—The impressions of the referee may be treated as positive findings of facts. This case would then be presented—that the stone was not furnished as fast as the contract required; that the testimony of the witness Sandford is admissible, and that such testimony proves that the plaintiff did waive any claim for damages arising from such delay to supply it.

1st. The first question is, whether the evidence of Sandford, or any evidence short of a sealed instrument, is competent to prove a waiver of the covenant to furnish the stone? The next, on the assumption of its admissibility, is, whether any waiver is proven?

It was supposed in *Barnard v. Darling*, (11 Wendell, 30,) that it was yet unsettled whether an unexecuted parol agreement would have the effect of discharging a sealed instrument. But such an

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agreement, fully carried out, amounts to a discharge. This last proposition is sustained by several cases. (*Lattimore v. Harsen*, 11 John. Rep. 330; *Dearborn v. Cross*, 7 Cowen. 47, and authorities cited. See also Greenleaf on Evidence, § 303, and cases.)

In *Delacroix v. Bulkly*, (13 Wendell, 75,) the Chief-Justice says: "The extent to which these cases have gone is this: that after the breach of a sealed contract, the parties may discharge any liability upon it by entering into a new agreement relating to the same subject matter, which new agreement is a valid contract, founded upon a sufficient consideration." . . . "After breach of a sealed contract, a right of action may be waived or released by a new parol contract in relation to the same subject matter, or by any valid parol executed contract."

2. Testimony to prove a waiver of the damages upon a new agreement on full consideration, being then admissible, the next question is, does the evidence make out such a case?

[The testimony was then examined at length, and the court concluded that the instruments corroborated the evidence of Sandford, that the substitution of the new security offered by the plaintiff, was accepted by the company on the condition of the waiver of all claim for damages in consequence of the omission to perform the contract strictly.]

3. The next important question is; whether the defendants can claim that the bond and mortgage delivered to Abenethy, be retained as security for the extra stone supplied and work done by them?

For this extra work, the referee has allowed the sum of \$3440.90 (2686.94 + 753.96) independently of interest. It seems that the sum of \$2686.94 was for stone supplied and work done before the transaction of April, 1854. I consider that the other amount was for subsequent supplies.

The defendants, in the first place, take the position that they cannot be compelled to surrender their security and cancel the mortgage, without payment for the extra stone furnished at the plaintiff's request; that interpreting the agreement in the most limited sense, and assuming that the mortgage, in its terms and import, only covered stone provided for in the original contract, yet the security cannot be taken from them without payment of this new demand.

Next, that the parol agreement is made out, is valid, and gives them the right.

It is urged by the plaintiff, and to a great extent with truth, that the doctrine of tacking is unknown to our law. When that doctrine is carried to the length of enabling a mortgagee to unite a third incumbrance to his own, to the prejudice of an intermediate mortgagee, of whose claim he is ignorant, our law condemns the rule. Other examples of the principle carried to an extremity clearly denounced in our tribunals, may be found in Mr. Powell's elaborate treatise. (On Mortgages, vol. 2, p. 423, etc.)

But the question is different when the case is exclusively between a mortgagor and mortgagee, and especially when the mortgagor comes to ask for an assignment of his security.

In this simple form, the right of the creditor to require payment of a further subsequent claim was recognized by the Civil Law. (Code 8, 27, 1. Vide Digest Lib. 13, 7-8.)

In *James v. Rogers* (15 Mass. Rep. 3, § 9) Justice Jackson, in an able opinion states, as the result of his examination of the Roman law, that a pledge might be retained, not only for the amount loaned upon it, but for all other moneys due to the pledgee on any account whatever. He cites Huber, *Prælectiones*, Heinecius, and the Code. Justice Wilde admits this to be the rule as to debts contracted after possession of the pledge, and so does Chief-Justice Parker.

Judge Story admits that the civil law authorizes a mortgagee to unite, as against his own debtor, a second loan without security to the first, when the debtor seeks to redeem. (Story's Eq. § 415, n. 2; *Ibid.* 1010.) See also Domat, vol. 1, p. 348, Art. 4, and the note.

A somewhat similar doctrine is found in the French Code. A novation of the debt as a general rule, extinguishes the hypothecation. But when it operates solely between the creditor and debtor, to whom the mortgaged property belongs, they can by contract, transfer the things mortgaged for the ancient debt to the new one. This works no prejudice to the other creditors, because it does not prevent them from seizing the property, and selling it precisely as they might have done before the translation. The new obligation cannot exceed the old in amount, and it must be made at the time of the novation, not subsequently. (*Toullier Droit Civil Française*, tome 7, Arts. 308, 310, and note to 312.)

In the earlier case, in England, it was explicitly laid down, that a mortgagee coming to redeem, must pay any moneys subsequently advanced, as well as the original mortgage money. In *Demany v. Metcalf* (Gilbert's Rep. 104) this rule was stated in the analogous case of a pledge of jewels; and the Lord Chancellor stated his opinion to be that the rule would be applied to a mortgage of lands. In *Baxter v. Manning* (1 Vernon, 244) the point was decided in case of a bond given for moneys subsequently advanced, and without any special agreement. *Halliday v. Kirtland*, (2 Chan. Rep. 361,) and the anonymous case, (3 Salkeld, 84, fol. 7,) are to the same effect.

The case of *Coleman v. Winch* (1 P. Will. 775) is generally cited by the text writers, as reversing these decisions. But it is far from having that effect. An ancestor borrowed £100, and mortgaged lands to secure it; he afterwards borrowed £100 more upon bond; he died, and his heir conveyed the equity of redemption to trustees, to pay all his father's bond and simple contract debts. The trustees brought a bill to redeem, and the defendant insisted upon the right of having both debts paid. This was denied. But Lord Macclesfield expressly admitted, that if the heir had come to redeem, he must have paid both demands. The difference was, that the rights of creditors intervened in consequence of the conveyance in trust by the heir.

The same principle is found in *Lothian v. Hassel* (3 Bro. Ch. Rep. 102). There shall be no tacking as against other specialty creditors, where the suit is for the administration of legal assets.

I have examined a large number of subsequent authorities down to *Jones v. Smith*, (2 Vesey Jr. 372, 1794,) in which case they are reviewed. Lord Alvanley states, as the result, that a bond may not be tacked to a previous mortgage, as against a mortgagor, nor against creditors, but may be as against the heir, to avoid circuitry of action. That if there are two mortgages to the same person of different estates, and one is deficient in value, the party can only redeem by paying both: and why a bond should not be upon the same footing, he did not know. It was impossible to say why a bond should not be tacked as well as a mortgage.

The doctrine that two mortgages may be thus united upon a bill to redeem is also recognized in the case of *Watts v. Symes* (8 Eng. L. and Eq. Rep. 207).

There were several cases before Lord Eldon bearing upon the point.

In *ex parte* Langston, (17 Vesey, 228,) in bankruptcy, he held, that an equitable mortgage by deposit of deeds should stand for future advances, upon proof of a distinct agreement, though by parol, to that effect. In *ex parte* Waner, (17 Vesey, 202,) *ex parte* Whitbread, (ibid. 209,) and *ex parte* Kensington, (2 V. and Bea. 79,) the same rule was declared. In the latter case he expressed his strong disapprobation of the doctrine.

Then in *ex parte* Hooper, (19 Vesey, 477; 1 Merivale, 7,) he expressly ruled, that where there was a legal mortgage, it could not be rendered a security by subsequent advances, upon parol evidence of an agreement to that effect. It would be a violation of the statute of frauds, requiring a writing to change lands.

In *Diver v. McLaughlin*, (2 Wendell, 599,) the law is stated in the same manner, as also in *Walker v. Snediker*, (1 Hoffman's Rep. 147,) and Chancellor Kent treats it as the settled English rule. (Comm. vol. 4, p. 176.)

In *Rolfe v. Chester*, (25 L. J. Rep. p. 246, 1854,) the right of a mortgagee to have a simple contract debt tacked as against the heir, was admitted, simple contract debts now binding real estate.

In *James v. Rice*, (27 L. and Eq. Rep. 342; 5th De Gex and McNaughton, 461,) deeds had been placed in the hands of the plaintiff, as security for a promissory note, and upon a further advance, the party promised to execute to the lender a mortgage for the whole amount. This was held binding. See, also, *Uppington, v. ———*, (2 Drury and Warren, 184.)

Some cases in our own state bear upon the question. *Grant v. The United States Bank*, (1 Caines Ca. in Error, 112,) and *James v. Morey* (6 John Ch. Rep. 420, and 2 Cowen, 247).

Justice Willard treats *James v. Morey* as establishing this proposition, "that if a deed, absolute in its terms, be intended as a mortgage, and it be shown by parol to be also intended as a security for further advances, it will, as between the parties, be treated as a mortgage for the subsequent advances as well as the original debt." (Eq. Jur., 436.)

That this proposition is warranted by the opinion of Chancellor Kent, when the cause was before him, cannot be disputed.

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But in the Court of Errors, Justice Woodworth, after examining various cases: says "They show conclusively that the respondent cannot divert the securities taken, from the objects specified, when it formed no part of the original agreement, nor was ever assented to subsequently by Wattles, (the debtor,) and particularly when an objection is interposed by a *bona fide* creditor, holding a judgment made valid by an amended specification."

This question was considered as of so little moment in the decision of the cause, that neither of the other Judges or senators notice it in their opinions, or only to pass it over.

As to decisions in some other states, see *Soupture v. Johnson*, (3 Con. Rep., 211,) and *Chamberlain v. Thompson*, (10 Con., 251,) allowing the union of demands upon a bill to redeem. So in Maryland (*Lee v. Stone*, 5 Gill & Johnson, 22).

Another class of cases may usefully be adverted to. In *Walker v. Snediker*, (Hoffman Rep., 146,) I observed, that it appeared to be the better opinion, if not the settled law, that a mortgage which was to cover future advances ought to express the object on its face. In *Craig v. Tappin*, (2 Sand. Ch. Rep., 82,) Assistant Vice-Chancellor Sandford came to a different conclusion after examining the authorities, and held, that it was enough that the mortgage show upon its face the utmost amount which it was intended to secure; and up to that amount it would be valid for future advances, when such was part of the original agreement.

In *The Bank of Utica v. Finch*, (3 Barb. Ch. Rep., 294,) Chancellor Walworth declares the rule to be, that future advances may be covered by a mortgage to the extent of the sum mentioned in it. He says, "that parol evidence is admissible, not to contradict the written instrument, but to show the purpose and extent for which it was executed. It was admissible to show that credit had been given to Finch upon the several discounts for him on the faith of the mortgage, and that it was treated by the complainants as a continuing security. Here is a mortgage, the record of which is a notice to all of an incumbrance to the extent of \$30,000, and I suppose the holder of that mortgage may advance upon it up to that amount, and may be secure in his lien to the extent of his advance within that amount, such having been the agreement between himself and the mortgagor.

In such a state of the authorities we are at full liberty to deter-

mine the question untrammelled by peremptory decisions. We cannot but conclude that parol evidence of an agreement, by which a mortgage given to secure a definite sum, shall operate to secure a further sum subsequently advanced, contradicts the rule, that such evidence shall not be allowed to add to the terms of a written instrument, and would, in effect, charge lands without an instrument in writing, signed by a party competent to charge them. (2 R. S., 134, § 6.)

The English authorities are of various classes. One is of bills to redeem, where the forfeiture being perfect at law, the court has refused its interference but upon payment of other demands justly due. This was held in the early cases, but it is very doubtful if it is now the law.

Another class is of mere equitable mortgages, where the whole principle is the intendment resulting from the advance and deposit of deeds. This peculiar equity is, perhaps, unknown in our state, probably from the operation of the registry acts.

A third class is, where the question is between the heir or devisee and mortgagor; then, when there are legal assets, a bond creditor heretofore, and lately a simple contract creditor, may unite his demands. The reason is, that the land has become subject to a lien in his favor.

The union of one mortgage debt to another mortgage debt, as against the mortgagor, rests upon the same principle of a charge on the land.

As to the decisions in our own state respecting the extension of a mortgage, so as to cover future advances, I understand it to be the law, that they never can exceed the sum stated in the mortgage, and I understand it not to be the law of any case, that if such sum was unpaid, the mortgage could, by parol, be extended to an additional sum.

Thus understood, there is a lien created for a definite sum, the advance of which may be made in different amounts at different times. This is a very different case from that of the original debt unpaid, and a parol agreement to charge the mortgaged land with another sum.

We have been much struck with the consideration, that in truth, there is here a judgment in favor of the defendants, for a definite sum, which may be made to bind the real estate; indeed, the

Prentice v. Dike.

equity of redemption of these very lands. And the 274th section of the Code enables the court to give judgment for or against one or more of several plaintiffs, and for or against one or more of several defendants. Why not allow the payment at once of this sum, which may be recovered?

There are several answers to this view. The principle we have stated and adopted, is not carried out in its integrity by doing thus indirectly what could not be done directly. It does not appear that the judgment has been docketed, and until that is done, no lien is created. But chiefly, we should in this way deprive the plaintiff of the benefit of the redemption acts. His real estate will be held subject to the judgment, but in its regular order, and subject to those methods of enforcement and relief to him which the law has prescribed.

The result in our judgment is, that the defendants are not entitled to hold the mortgage as security for the amount of the subsequent extra supplies and labour.

There were some other points determined by the court, of no moment except to the parties, which it is not deemed necessary to repeat.

JOHN H. PRENTICE, and others v. HENRY A. DIKE, and others.

When an action is brought for the breach of an implied warranty, the existence and terms of the warranty, as material traversable, facts must be alleged in the complaint.

The sellers of wool knew that it was purchased by the plaintiffs for the purpose of being manufactured into hats, and that if there was any cotton in it, it would be unfit for the purpose intended, but they did not warrant that it was fit for that purpose, but only that the flocks sold contained no cotton.

Held, that the jury had no right to infer from the evidence, that the defendants meant to warrant that the wool would be fit for the purpose for which they knew it was bought, the only warranty which it was proved that they gave, being restricted in terms to the fact that there was no cotton in the wool.

Held, that the only damages which the plaintiffs were entitled to recover for the breach of this warranty, was the difference between the market value of the wool in its actual state, and what it would have been worth had it contained no cotton, with interest on that difference.

Order denying a new trial affirmed, with costs.

(Before DUEB, BOSWORTH and WOODRUFF, J.J.)

November, 1856.

THE action was brought to recover damages for the breach of a warranty on the sale of wool.

The complaint alleged, that the defendants, in consideration that the plaintiffs would buy of them a lot of merchandise called flocks, for the sum of \$200⁷/₁₆; promised that the merchandise was free from any mixture of cotton; that the plaintiffs, in reliance upon this promise, bought the merchandise for the price demanded, and that at the time of the making of the promise by the defendants, the merchandise so bought, did contain a mixture of cotton, and was of no value to the plaintiffs; but on the contrary, by being manufactured with other materials in the course of the business of the plaintiffs, depreciated greatly the value of such materials and of the manufactured articles, and that by reason of the premises they the plaintiffs had sustained damages to the amount of \$1000, for which sum judgment was demanded.

The answer of the defendants denied the making of the promise stated in the complaint.

The cause was tried upon these pleadings, before Woodruff, J., and a jury, in March, 1856.

It was proved, upon the trial, that the plaintiffs were engaged as partners in the business of manufacturing wool and fur hats, and that the defendants were dealers in wool; that in May, 1855, two foremen in the service of the plaintiffs called at the store of the defendants, and asked the defendant Dike whether he had any flocks that would suit their purpose, and that he replied that he had some that he thought would suit them; that one of the foremen, on examining one of the bags containing the wool, said that there was cotton in it, and that Dike said no, and that he guaranteed that there was no cotton in it. The sale was then made for the price mentioned in the complaint.

It was then proved, on the part of the plaintiffs, that the flocks of wool which they so purchased, did contain a mixture of cotton. The plaintiffs' counsel then offered to prove that this fact was not, and could not have been discovered until the wool was used in the manufacture of hats, and he also offered to show the number of hats that were manufactured with a mixture of the cotton found in the wool, and averred that the plaintiffs were entitled to recover, as damages, the loss which they had sustained in the sale of these hats from that cause.

The Judge excluded the evidence so offered, and the plaintiffs' counsel excepted to the decision. Evidence was then given, on both sides, as to the value of the wool in its actual state, and what would have been its value had it contained no cotton.

When the testimony was closed, and the case had been summed up by the counsel, the Judge charged the jury that the only damages that the plaintiff could recover against the defendants, for the breach of their warranty on the sale of the goods, was the difference between the market value of the article sold as it was, and what it would have been worth had it been of the description it was represented to be, with interest on that difference.

To this instruction the counsel for the plaintiffs excepted.

The jury found a verdict for the plaintiffs for \$63.14.

The plaintiff moved, at Special Term, upon a bill of exceptions, for a new trial, and the motion was denied, with costs.

The plaintiffs appealed from this decision, and it was upon this appeal that the case was now heard.

E. Terry, for the plaintiffs, appellants.

We contend that the rule "*caveat emptor*" does not apply where an article is sold for a particular purpose. The seller then undertakes that the article shall be fit for that purpose, *Jones v. Bright* (536). The defendants were, therefore, liable on their implied warranty that the goods were suitable for the purpose for which they were bought. (*Van Brachlin v. Fonda*, 12 John. 468.) Even upon the supposition that such a warranty cannot be implied, the Judge upon the trial should have admitted the evidence offered as to the difference in value of the hats manufactured from a defective material, and what would have been their value if manufactured from the material as guaranteed; and he should have instructed the jury that the plaintiffs were entitled to recover that difference as damages. They were recoverable as consequential damages, immediately resulting from the breach of the warranty. (Sedgwick on Damages, 292; 2 Parsons on Contracts, 486; *Eggleston v. Macaulay*, 1 McCord, 379.) The counsel referred to several other cases as analogous, and insisted that all the exceptions stated in the case were well taken, and, consequently, that a new trial ought to be granted.

A. Underhill, for the defendants, respondents.

The only proper rule of damages for a breach of warranty on the sale of personal property, is the difference between the market value of the article if sound and the market value in its unsound state. (2 Hill, 288; 4 Hill; 5 Hill, 492, S. C. affirmed; 3 Denio, 406.) The rule is in fact elementary. (Sedgwick on Damages, 290; Parsons on Contracts, 486; 2 Kent's Commentaries, 480, n. a.) In all the cases where larger damages are allowed, there was not a mere warranty, but some other express stipulation was connected with it. This distinction is clearly stated by Justice Cowen in the opinion which he delivered in *Blanchard v. Ely*, (21 Wend. 342,) and is sustained by the authorities to which he refers.

There was, therefore, no error in the exclusion of evidence by the Judge on the trial, nor in his charge to the jury, and the order appealed from should be affirmed.

BY THE COURT. DUER, J.—It would be a conclusive answer to the position upon which the counsel for the plaintiffs seemed disposed to lay the stress of his argument, namely, that there was an implied warranty that the goods purchased should be fit for the purpose for which it was known they were bought, that no such warranty, nor any facts from which it could arise, are alleged in the complaint. We cannot doubt, however, that the existence and terms of an implied warranty, as material and traversable facts, are just as necessary to be alleged in the complaint, as those of an express warranty, where in each case the breach of the warranty is the cause of action, but as this objection to the argument, on the part of the plaintiffs, was not urged by the counsel upon the trial, nor upon the hearing before us, we must presume that it was meant to be waived, and shall, therefore, place our decision upon other grounds.

Although, when goods are ordered and manufactured for a particular purpose, there is an implied warranty that they shall be fit for the purpose specified, we know of no adjudged case in which such a warranty has been implied where the contract was merely for the sale of goods in their actual state, and certainly no such doctrine is to be found in any of the cases to which we were referred. We are satisfied, that, if there is any such decision, it will

be found, upon examination, that the facts in the case were widely different from those in the case before us. We are satisfied that such a warranty cannot be implied, either by the court or jury, merely from the facts that the purpose for which the goods were bought was known to the seller, and that he said at the time that, in his opinion, they were suitable for the purpose intended; still less can the warranty be implied, when an express warranty is proved to have been given, limited by its terms to a distinct and independent fact. We think that such an express warranty excludes the supposition that any larger one was intended than its terms embrace.

Hence, if the plaintiffs, or their agents, in the present case, desired a larger warranty than the terms of the express warranty embraced, they should have required it to be given as a condition of their purchase: they had no right to rely upon a larger warranty as implied.

Nor can we assent to the second proposition, upon which the counsel for the plaintiffs insisted, namely, that the plaintiffs were entitled to recover the loss which they sustained in the sale of the hats containing a mixture of cotton, as consequential damages immediately and necessarily resulting from a breach of the express warranty as proved. These damages were not in any legal sense a necessary consequence of a breach of the terms of the warranty, they resulted solely from the use of the goods in the manufacture of hats, but this was a use to which the plaintiffs were under no necessity of applying the goods; they were at perfect liberty to apply them to a different purpose, or to sell them in their actual state. It is true that the damages which the plaintiffs claimed necessarily resulted from the unfitness of the goods for the purpose for which they were bought, but we have already shown that there was no warranty on the part of the defendants that the goods should be fit for the purpose intended. To hold that the defendants were liable for the damages claimed, would be to contradict ourselves by saying either that the terms of the express warranty embraced the fitness of the goods, or that there was an implied warranty of the same purport. Satisfied that there was no such warranty, express or implied, we cannot hold the defendants liable for damages resulting from its alleged breach. In truth, the second proposition of the learned counsel, although different in words, was

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in substance the same as his first. It asserted in a different form the existence of an implied warranty.

It follows, from these observations, that the true and only rule of damages applicable to the case was exactly that which the Judge upon the trial instructed the jury to follow, and as there was no error in his charge there was certainly none in his exclusion of the evidence that had been offered to prove that the plaintiffs had in fact sustained the whole loss which they claimed as damages to recover; this evidence, if there was no error in the charge, was properly excluded as irrelevant, since it had no bearing upon any question that the jury could have been required to determine.

As none of the exceptions taken on the trial can be allowed, the order denying a new trial must be affirmed, and the appeal be dismissed, with costs.

**SARAH S. SMITH, administratrix, etc., of TIMOTHY S. SMITH v.
NEW YORK AND HARLEM R. R. Co.**

The deceased was an engineer in the employ of the New Haven R. R. Co., and was killed by the accident of the cars which he was running being thrown off the track of the road; the action was brought by his widow, as his administratrix, for the recovery of damages, under the statute, and was founded on the allegations that the accident was caused, partly by the negligence of a switch-tender in the employ of the defendants, and partly by the insufficiency of the switch itself. Both these questions of fact were submitted to the jury, and were found by them in favor of the plaintiff.

The Judge, upon the trial, charged the jury that, although the deceased was in the employ of the New York and New Haven R. R. Co., yet if he was running their train upon the defendant's railroad, and by reason of the negligence of the switch-tender employed by the defendants, that train was thrown from the track, and his death thus caused without any negligence on his part concurring to produce the accident, the defendants were responsible in the action.

To this portion of the charge the counsel for the defendants excepted.

The Judge also charged the jury, that if there was on the part of the defendants a want of reasonable skill and prudence in the construction of their road at the place of the accident, or a neglect on their part to adopt a useful improvement in the construction of the switch, by which the danger of the accident would have been materially reduced, and which improvement was known to the defendants, and they had it in their power to apply it, the defendants were liable

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if their omission to adopt the improvement caused the accident, unless there was negligence on the part of the deceased that concurred to produce the result.

To this part of the charge the counsel for the defendants also excepted.

Held, that the exceptions were not well taken, the charge of the Judge being, in point of law, entirely correct, and being directly applicable to the questions of fact raised by the evidence.

Held, further, that the finding of the jury upon the questions of fact, specially submitted to them, was fully sustained by the evidence.

Judgment for plaintiff affirmed, and new trial denied, with costs.

(Before DUEB, SLOSSON and WOODRUFF, J.J.)

Heard, November; decided, December, 1856.

APPEAL from a judgment in favor of the plaintiff, and from an order denying a new trial.

The cause was before the court upon a case containing the proceedings and exceptions on the trial, all of which, together with the issues raised by the pleadings, are fully stated in the opinion of the court.

C. W. Sandford, for the defendants, appellants, moved for a reversal of the judgment. He cited 6 English R. R. cases, 580.

E. Seely, for the plaintiff, contra, cited *Coon v. Syracuse and Utica R. R. Co.*, (1 Seld., 492, and 33 Eng. L. & Eq. R., 1; 4 Metcalf, 49.)

BY THE COURT. SLOSSON, J.—The action is brought by the widow, as administratrix of Timothy St. John Smith, an engineer in the employ of the New York and New Haven R. R. Co., to recover, under the statute, damages to the widow and two infant children, occasioned by his death, in consequence of the alleged negligence of the defendants in not providing a proper switch at a point of their road at the Melrose station, in Westchester county, between New York city and Williams' Bridge, the road between which points was used by the New Haven Co. for the running of their cars with the consent of the defendants, and for a compensation paid by the latter company to the defendants; and the plaintiff alleges, that on the 9th of October, 1854, a locomotive with passenger train, under the management and guidance of the deceased, as engineer as aforesaid, was thrown from the track at Melrose aforesaid, and the said Smith was killed; the cause of the catastrophe being that the defendants "carelessly, negligently, and

improperly suffered and permitted a switch of an insufficient, unfit, and improper character and construction to be used at that place, and by their negligence, unskilfulness, want of care, etc., through their servants in that behalf, so carelessly, negligently, and wrongfully placed and turned the said switch, and left the same so carelessly, etc., turned, and made their signal of safety so carelessly," etc., that the train was thrown from the track, and the engineer killed.

The defendants deny the unfitness of the switch, and allege that the engine was thrown from the track "in consequence of the accidental misplacement of a switch by a switchman employed by the defendants, and the carelessness and negligence of the deceased," but they aver, "that the said switchman was a suitable and proper person to be employed by the defendants, and had always maintained, until the accident, the reputation of a sober, honest, and capable person for such an employment." And they further allege, that the deceased entered upon and continued in his said employment "with full knowledge of the construction of the road, and the mode and manner in which the switches and turn-outs upon the road were conducted and managed, and that he took the risk of his employment, and of the character and capacity of the various persons employed thereon," and they deny negligence on their part.

The evidence as to the good character and qualifications of Lawless, the switch-tender, was uncontradicted.

The switch was out of place; in respect to this there is no dispute. As the train approached, the white flag, signal of safety, was held out by the switch-tender, and one witness says he saw it a quarter of a mile off. The witnesses differ as to the rate of speed at which the train was moving, varying in their estimates from twelve to eighteen and twenty miles an hour.

The men employed on the road between the city and Williams' Bridge, are all employed by the defendants, the Harlem Company.

There were six switches at this station, three long and three short. The question as to the sufficiency of the switch in question, which was a short switch, turns on the point, whether it is or not inferior to what is called the "frog and guard rail." On this subject the evidence on the part of the plaintiff is very conclusive.

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Schuyler, a railroad engineer, swears that the frog and guard rail require no switchman, and that the shut switch is not now used to his knowledge, in consequence of the superiority of the frog and guard, though he does not mean to say they are not used on any road, as he has seen them in various places.

He says the frog and guard rail is superior to the shut switch, and is uniformly deemed better by engineers, but he says there is no difficulty in the shut switch, if it is in its proper place.

Sanborn, the conductor, who had been five years on railroads, swears that shut switches are not as safe as frog and guard rails; the weight of the engine is calculated to displace a shut switch. He says that if this had been a frog and guard rail they would have gone safe. He says that the shut switch is not used on the Erie road, and the Eastern roads, but the frog and guard.

Mather, a civil engineer, says the best method of construction is to use the frog and guard rail, and it is always used now; and he says the advantage it has is this, it is a fixture, and always right, whereas the shut switch is movable and liable to be out of place. The frog and guard, he says, are altogether safer than the switch, and the latter is not now used on any railroad that he knows of except one in South Carolina. Most railroads, he says, have changed from the shut switch to the frog and guard rail, "The frog and guard rail are now universally used as far as I know."

One witness swears that the switches at that station were in a very bad condition, while the witnesses for the defence swear that they were all in good condition.

On the part of the defence, one witness swears that if he was riding over the road, and was sure it was in its place, he would prefer the shut switch. Another swears this was as good a switch as any of its kind could be.

One witness swears that he should not think the frog and guard rail were used because they are safe; he says that in the course of time they are cheaper, because the shut switch requires a man to be in constant attendance. It thus appears that the difference between the two is, that the frog and guard rail is always in its place, and requires no switch-man to attend it, while the shut switch absolutely requires the attendance of a switch-man in order to safety.

When the plaintiff rested the defendants moved for a dismissal of the complaint, on the ground that the accident was occasioned by the negligence of a fellow-servant engaged in the same business, and was one of the risks assumed by the deceased by virtue of his employment. The motion was denied, and the defendants excepted.

The Judge charged that defendants were liable for the carelessness of the switch-tender employed by them, supposing no negligence on the part of the deceased, notwithstanding he was an employee of the New Haven Company; and to this there was an exception. He also charged that it was negligence on the part of the defendants not to adopt a useful improvement in the construction of the switch, by which improvement the danger of accident would be materially reduced, if the improvement was known to them, and they had it in their power to apply it; and for which negligence they would be liable, provided the accident was caused by such omission on their part, the deceased himself not being guilty of negligence. The proposition was stated with this qualification, however, to wit., that the improvement had been proved, and found to be valuable as a means of promoting safety, and was known to the defendants, and was within their power so as to be reasonably practicable. To this charge, also, the defendants excepted.

Two questions were then left to the jury.

1. Whether the death was caused by the negligence of the switch-tender, without any negligence on the part of the deceased concurring to cause the result?

2. Whether negligence, on the part of the defendants, in not providing a proper switch also caused the accident, without any negligence on the part of the deceased?

Both which questions were answered affirmatively by the jury, and a general exception was taken to the charge.

The jury found a verdict for the plaintiff for \$5000, the full amount allowed by the statute.

We find no fault with the finding of the jury on the questions submitted to them, as the evidence clearly justifies it in both particulars, and the only questions are, whether they were properly instructed as to the law, and whether the court erred in refusing a nonsuit?

The motion for a nonsuit was made on the ground that the switchman and the engineer, (the deceased,) though employed the one by the Harlem and the other by the New Haven Company, were to be considered, in consequence of the peculiar arrangement between the companies for the use of the same track in common, as engaged in a common service, and that the defendants were, therefore, not responsible, the death being caused by the negligence of a fellow-servant. Had the relation between the two been such, there is no doubt, assuming that the disaster was wholly attributable to the negligence of the switch-tender, without any fault on the part of the deceased, that such would be the rule. (*Conn. v. Syrac. and New Haven Railroad Co.*, 1 Seld. 492.)

But it would be difficult to maintain this position, and the Judge who tried the cause, clearly took a different view of the case, or he would not have instructed the jury that the defendants were responsible for the negligence of the switch-tender, if the deceased himself was not guilty of negligence.

In this, we think, he was right. If the New Haven Company were running their cars on the defendant's road, by no higher authority than the mere permission of the latter, still the defendants would be liable to a passenger in, or to a person employed upon, said cars, for any negligence on their part, or on the part of their employees, by which injury should be caused. The act of March 29, 1848, authorizes the New Haven Company to run their cars upon this section of the defendant's road, upon such terms as may be agreed upon between the two companies. What these are the court is not informed, no evidence thereof having been given, and it is not reasonable to suppose that they are of such a character as to make the servants of the two companies, while on this part of the route, agents or employees in a common sense.

But if this question were doubtful, which we do not consider it, or were even clearly the other way, still, the verdict must be sustained under the finding on the second question submitted to the jury, since the rule exempting the principal from liability in such a case has this qualification, that the principal himself is not in fault.

Judge Ruggles in delivering the opinion of the Court of Appeals in *Keegan v. The Western Railroad Co.*, (4 Seld. 175,) which was an action by a fireman, in the employ of the company,

for damages occasioned by a defective boiler, thus clearly defines the rules: "The cases in which it has been held that a principal is not liable to one agent or servant, for an injury sustained by him in consequence of the misfeasance or negligence of another agent or servant of the same principal, while engaged in the same general business, are applicable only where the injury complained of happened without any actual fault or misconduct of the principal, either in the act which caused the injury or in the selection and employment of the agent by whose fault it did happen. Whenever the injury results from the actual negligence or misfeasance of the principal, he is liable as well in the case of one of his servants as in any other."

The Judge instructed the jury, in substance, that it was neglect in the defendants not to adopt the improvement of the frog and guard rail in the construction of their switches, if the jury should find it was known to the defendants, and they had it in their power to apply it, and that by it the danger of accident would be materially reduced; and in this we think he was clearly right. No rule could be more reasonable, and nothing less should be required of the railroad company; the safety of passengers and employees requires it.

In the case of *Hegeman v. The Western R. R. Co.*, (16 Barb. S. C. R. 353; 3 Kernan, 1,) the court held, that it was negligence in the defendants not to have adopted a safety-beam in connection with the axles of the cars, an invention well known and in extensive use, and by which the danger of accident was greatly diminished. The rule does not, as the Judge in the case at bar instructed the jury, "require the defendants to adopt or apply every new invention, nor any invention, the utility of which is in doubt; the obligation to use a new invention only arises when such improvement has been proved, and found to be valuable as a means of promoting safety, and that is known to the defendants, and the improvement is within their power, so as to be reasonably practicable."

The rule, as thus explained and qualified, is free from every objection, and of great practical utility and importance, and one which the courts should rigidly adhere to.

The jury have found that the accident in question was attributable to this cause, as well as to the neglect of the switch-tender,

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and we think this must settle the question of the defendants' liability.

It may be proper to add that the position taken by the defendants' counsel, that the deceased, knowing the condition of the road, took the risk of it, is, we think, unsound. A servant may be held to take the risk of the common and usual hazards of his employment, but certainly not of those hazards which are induced or aggravated by the omission of his employer to use precautions and means, the very existence of which may not be in the servant's knowledge, and which the nature of his service does not require him to know, but which it is the duty of the employer, from his peculiar position, both to know and apply; and much less can he be said to take the risk of the omissions and negligence of those who are not his employers, but who, by the relation in which they stand to his employers, are bound, in respect to the latter, and all employed by them, to the exercise of the like rule of prudence.

The judgment must be affirmed, with costs.

GEORGE W. BEAVERS v. NEHEMIAH B. LANE, and others.

It is settled law, that when the owner of personal property makes an unconditional delivery to his vendee, with the intent to transfer the title, a subsequent *bond fide* purchaser from such vendee acquires a valid title, although the owner was induced to sell by the fraud of his vendee.

It is also settled, that even when the owner qualifies his delivery by annexing as a condition, that immediate payment shall be made, still a *bond fide* purchaser, without notice of the condition, acquires a valid title.

But these rules are not applicable when it appears that the contract of sale to the subsequent purchaser was so far executory, that the thing sold had not been delivered, nor any portion of the price paid, so that, in the event of a recovery by the owner, such purchaser will sustain no damage beyond the possible loss of anticipated profits.

Although the contract, under such circumstances, may pass a valid title as between buyer and seller, it would not be available as a defence against the paramount title of the original owner.

It may be safely laid down as law, that no person, as against the true owner, is to be deemed a *bond fide* purchaser from the first vendee, when it appears that he had neither advanced money nor property, nor incurred liabilities upon the

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faith of such vendee's apparent title. He is not a *bond fide* purchaser when a recovery by the owner would leave him in the same condition as if no contract of purchase had been made by him.

It appearing to the court that such were the facts in relation to the purchase made by the defendants, *held*, that their situation in respect to the plaintiff, the original owner of the goods in controversy, was exactly the same as that of his vendee, and, consequently, that if the sale to him had been induced by his fraud, they had no defence to the action.

Held, further, that upon the evidence given on the trial, and the known rules of law applicable thereto, the questions, whether the sale to the vendor of the defendants had not been obtained by fraud, and whether the delivery of the property by the plaintiff was not conditional, so that the price being unpaid, no title passed, ought to have been submitted to the jury.

Held, therefore, that the complaint ought not to have been dismissed, and that the motion for a new trial must be granted.

(Before DUER, SLOSSON, and WOODRUFF, J.J.)

November 7; December 27, 1856.

MOTION on the part of the plaintiff to set aside a nonsuit, and for a new trial.

The action was brought for the delivery of the possession of thirty-six hundred bushels of oats, and the issues raised by the pleadings were tried before Oakley, Ch. J., and a jury, in November, 1854. When the testimony on the part of the plaintiffs was closed, the counsel for the defendants moved for a nonsuit, the court granted the motion, and the counsel for the plaintiff excepted to the decision.

A motion to set aside the nonsuit, and for a new trial, afterwards made at a Special Term by an order of the court founded on the consent of the parties, was directed to be heard at a General Term.

That the opinion of the court may be properly understood, it will be necessary to set forth the pleadings and the evidence given on the trial.

The complaint alleges that the plaintiff was, at and before the commencement of the action, the owner and lawfully entitled to the possession; that on or about the 21st day of April, 1854, the defendants wrongfully took and carried away the said property from the plaintiff, and wrongfully detain the same from him; that he has demanded the same from the defendants, and that they have refused to deliver the same to him.

The answer of the defendants denies the plaintiff's title, and

his right of possession of the 3600 bushels of oats mentioned in the complaint; denies that the defendants took or carried away the same, or any part thereof, from the plaintiff; and denies that they unlawfully have detained or do detain the same, or any part thereof from the plaintiff.

The answer then states, as to 2553½ bushels of oats, parcel of the property claimed in the complaint, which was in the possession of the defendants at the commencement of this action, and the delivery whereof to him the plaintiff claims herein, that those 2553½ bushels of oats were, at the commencement of this action, the defendants' property, and that they were lawfully in the possession thereof.

Upon the trial of the issue so joined, the evidence produced by the plaintiff showed that, on the night of the 18th of April, 1854, one Cox directed a person in his employment, to purchase for him "along the North River" from eight to ten thousand bushels of oats, and instructed him, in case inquiry was made respecting the time of payment, to say "the usual time." The agent, on the following day (Wednesday, the 19th), found the plaintiff's canal boat at Pier No. 12, North River, with upwards of 7000 bushels ("understood to be 7500 bushels") on board, and purchased from the plaintiff "all there was in the boat." The price agreed on was fifty cents a bushel, and nothing was said about credit. "The usual terms," unless there is some other understanding, are cash on delivery. It was agreed that the oats should be sent to Pier No. 26, East River, to be there measured, and Cox, the purchaser, was to pay "for what they measured." The plaintiff's boat was removed to the place appointed on the East River, and the next day (Thursday) the measurer began to measure the oats. As the oats were measured they were poured into boats provided by Cox. One boat was filled, and the oats therein were, on the following Monday, taken by Cox (or his agent) to a ship, and were put on board, for what destination does not appear, nor is it material. The residue were poured, as they were measured, into another boat belonging to Cox, called the J. P. Whiley, and on Saturday morning the measuring was finished, and at about three or four o'clock in the afternoon, the measurer's return of the quantity, 7175 bushels, was left at the store of the plaintiff. On Monday morning, at about ten o'clock, the plaintiff called upon

Cox to ascertain something respecting the apparent deficiency in the quantity of the oats, and inquired where the oats were. Up to this time no bill of the oats had been presented by the seller, and no demand of payment had been made, and there was testimony to show that on cash sales in that kind of trade, although the usual terms are cash on delivery, yet, that by the usage and custom, the bill is presented for payment the same day or the next day after the measurer's returns are made to the parties; but that, nevertheless, the seller sends in his bill when he chooses.

At 12 o'clock, noon, of Monday, the plaintiff presented his bill to Cox, and demanded payment for the whole quantity returned by the measurer, and he then learned that Cox had failed, and of course the bill was not paid; and he then demanded the oats.

On the next day, Tuesday, April 25th, this action was commenced, and the sheriff, who was directed to take the property, found the boat of Cox (the J. P. Whiley) at Pier No. 2, East River, and the measurer then employed in measuring the same oats, and pouring them, as they were measured, from Cox's boat into the boat of the present defendants.

In the mean time, the quantity on board the J. P. Whiley had been reduced by some other disposition thereof, to 2553½ bushels. In what manner the sheriff served the process does not appear by the case, but notwithstanding the measurer "was stopped by the sheriff at noon" of Tuesday, he went on by direction of defendants, and completed his measurement, pouring the whole of the 2553½ bushels into the defendants' boat.

It also appeared by the testimony, that there were in the J. P. Whiley, 700 or 800 bushels of oats before any were poured into her from the plaintiff's oats; but that does not seem material, as the identity of the oats delivered to the defendants, is not questioned. At all events, a larger portion of them were clearly the oats sold by the plaintiff.

In support of the defendants' title, there is evidence that the defendants purchased the 2553½ bushels of oats, that is to say, "what oats were in the boat" J. P. Whiley, on Monday the 24th April, from Rawles & Seymour, commission merchants, at 51½ cts. per bushel; that the purchase was for cash. There was not only no evidence that the defendants had paid for the oats, but upon

the face of the bill rendered by Rawles & Seymour was a direction, in the handwriting of one of the defendants, not to pay the bill. And no evidence was given respecting the title, if any, of Rawles & Seymour, or their authority to sell, except the fact that the oats continued in the boat of Cox, and were in process of delivery from that boat into the boat of the defendants when this action was commenced.

The counsel of the parties now submitted the case upon printed points.

F. B. Cutting, for the plaintiff, submitted the following points:

The nonsuit, or dismissal of the complaint, was erroneous.

I. There was evidence sufficient for the consideration of the jury that Cox directed his clerk to purchase the oats, with the preconceived intention of not paying for them. This appears from, 1. His instructions to the clerk. 2. His insolvency, which was declared early on Monday, the 24th November. 3. The absence of all explanation as to the causes of his suspension. 4. The haste with which he attempted to sell the oats, through his broker. 5. The rendering of a bill before the oats had been delivered to the defendants, contrary to the usage of the trade.

II. The oats were sold payable cash on delivery. As between Cox and the plaintiff, the title of the latter was not divested until performance by the former (*Van Neste v. Conover*, 20. Barb. 554, and cases there cited.) *a.* The oats were payable in cash on delivery, by agreement, by usage, and as matter of law. *b.* There was no delivery until the oats had been measured, and the quantity ascertained by the parties, so that the price to be paid could be ascertained. *c.* The plaintiff did not receive the measurer's return until between 3 and 4 o'clock of Saturday, the 22d April, and on Monday he presented the bill of sale; and demanded payment. There was then a dispute as to the quantity. On the same morning the plaintiff demanded payment of the quantity stated in the measurer's return; and then Cox avowed his insolvency. *d.* The plaintiff had the right to retain possession of the oats as between himself and Cox. *e.* The delivery was conditional on the payment of the price; and not having been paid for, there was no delivery in law.

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III. The defendants did not obtain title to the oats by their agreement to purchase from Rawles & Seymour, 1. Rawles & Seymour had no title. 2. The defendants had notice of the plaintiff's rights before the oats were delivered to them. 3. They paid nothing on account of the oats.

IV. The nonsuit ought to be set aside, and a new trial ordered.

Wm. M. Evarts, for the defendants, submitted the following:

I. The plaintiff's sale to Cox of the boat-load of oats in the "Champion," on the 19th April, was executed and complete so as to pass the title. The delivery of the oats was complete either by placing the whole boat-load at Cox's disposition on that day, or, certainly, when the oats had been fully measured out from plaintiff's boat into Cox's boats, and mingled with his other cargo therein, at or before ten o'clock, A. M., April 22d. *Read v. Gibbs*, (3 Sandf. S. C. R. 203); *Smith v. Lynes*, (1 Selden, 41.)

II. This delivery from plaintiff to Cox was unconditional, and left no right in the plaintiff to reserve or reclaim the possession from Cox upon his default in payment, had the oats still remained in his hands.

III. The defendants' right is superior to Cox's. They became purchasers in the market from Rawles & Seymour, who had possession of the oats, and sold them as owners, and, on such sale, delivered them to defendants.

IV. The plaintiff has attempted no impeachment of the title or possession of Rawles & Seymour, and no presumption to the prejudice of either, can arise on the proofs. The defendants stand, then, as *bona fide* purchasers, in the regular course of trade, from regular and reputable dealers, whose right to sell is not discredited.

V. The fact that the defendants had not paid the price on their purchase from Rawles & Seymour is immaterial. By the executed sale the title had passed to them, and the property was at their risk. As *bona fide* purchasers they were entitled to their bargain, and the subject of it, and this whether they had paid for it or bought on credit. *Olyphant v. Barber* (5 Denio, 379), *Crofoot v. Bennett* (2 Coms. 258).

VI. The defendants should have judgment, with costs.

BY THE COURT. WOODRUFF, J.—The counsel for the plaintiff, in support of the present motion, insists that the nonsuit was erroneous, because the defendants had, at the time of the commencement of this action, acquired no title to the oats in question, or if they had acquired any title upon which they could claim or retain the possession as against the plaintiff's vendee, (Cox,) it cannot avail them as against the plaintiff himself, i. e., they had no other or better title than Cox himself. That Cox had no title as against the plaintiff for two reasons, that the purchase by Cox was fraudulent, and made with the preconceived intention not to pay for them, and also that the sale being for cash on delivery, the act of measuring, which for convenience was done from one boat into the other, did not constitute an absolute delivery, but was conditioned upon the payment therefor on the coming in of the measurer's returns; and that there was evidence tending to establish all the facts which enter into these propositions, which evidence ought to have been submitted to the jury.

The counsel for the defendants, on the contrary, insist that the delivery of the oats to Cox was complete, absolute, and unconditional, and that the defendants are *bona fide* purchasers without notice of any defect in the title of the parties in possession, and are therefore entitled to retain the property and enjoy the fruits of their purchase, although they have paid nothing and had not received complete delivery when the action was commenced.

It is not denied by the counsel in this case that when an owner of property makes an unconditional delivery to his vendee, with the intent then to transfer the title to him as purchaser, a subsequent *bona fide* purchaser from such vendee will acquire a valid title, although such owner was induced to sell and deliver by the fraud of his vendee.

Nor is it denied that, where an owner, having sold his property, qualifies the delivery thereof by annexing a condition that payment shall be made, still a *bona fide* purchaser from the vendee, without notice of the condition, will acquire a valid title.

Both of these propositions have recently been considered and decided in this court, and the cases on the subject collected and discussed. (See *Caldwell v. Bartlett*, 3 Duer, 341; *Keyser v. Harbeck*, ib. 373.) Since the case of *Mourry v. Walsh*, (8 Cow. 238,) the former proposition has not been disaffirmed, and the case of

Smith v. Syms, (1 Selden, 41,) in the Court of Appeals, distinctly affirms the latter.

Before considering the question whether the title of Cox, the plaintiff's vendee, to the oats in question, was valid as against the plaintiff, it is proper to inquire, whether the defendants are *bona fide* purchasers within the meaning of these rules?

It is quite clear that there was no sufficient evidence in this case to warrant the court in saying that Rawles & Seymour, from whom they made their purchase, were such purchasers, and the defendants cannot therefore repose upon Rawles & Seymour's title. They, Rawles & Seymour, are not shown to have in fact purchased from Cox or any one else. They are not shown to have had the possession at any time; the oats remained in the boat of Cox. They are not shown to have paid any thing for the oats, or to have made any advance thereon. The fact, which is proved, that they assumed to negotiate a sale to the defendants, and that a delivery was begun in pursuance of their contract of sale, indicating that they had, for this purpose, a control over the oats, is entirely consistent with the continued possession and ownership of Cox, because it is proved that Rawles & Seymour are commission merchants, and there is no proof that they acted in any other capacity. If, then, it shall appear that Cox had no title valid as against the plaintiff, the proof comes far short of showing that Rawles & Seymour are *bona fide* purchasers from him, entitled to protection as such against the plaintiff's claim. The evidence indicates rather that they were negotiating a sale for Cox to the defendants.

The defendants must, therefore, for the purposes of this branch of the case, rest upon their own position as purchasers, and this, we think, is insufficient. It is not enough to constitute a *bona fide* purchaser, (within the meaning of the rule,) that he has entered into an executory contract of purchase which, if not performed, will leave him in the same condition as if no such contract had been made. It has been said, it is true, that a mere contract for the sale of goods, where nothing remains to be done by the seller before making delivery, transfers the right of property, although the price has not been paid, nor the thing sold delivered to the purchaser. (*Olyphant v. Barber*, 5 Denio, 382, and cases cited.) This may be true as between buyer and seller for

many, or all, purposes, and yet the right of a defrauded vendor of the latter have a paramount right, against which such a contract of sale will avail nothing. The general rule, that one shall not profit by another's fraud, forbids such a result. But in the present case something yet remained to be done by the seller at the very time when this action was commenced, and when the defendants received notice of the plaintiff's claim. They had purchased the oats which were in the boat of Cox, "more or less," at 51½ cents per bushel. Measurement was necessary, and neither measurement nor delivery was completed when the sheriff interrupted its progress, and the defendants received notice of the plaintiff's claim. They had paid nothing. They had not obtained possession. If the oats were taken from them by the plaintiff, they would be in no worse position, (assuming, of course, in this view, that the plaintiff had a better title than Cox,) than they were before their contract of purchase was made. They would simply have failed to realize a profit which, if Cox had title, they might probably have realized from the transaction. The rule may safely be stated that no one is a *bona fide* purchaser, in the sense now proposed, who has neither advanced money nor property, nor incurred liabilities, upon the faith of his vendor's apparent title, and without notice of any defect therein; and by liabilities is meant those obligations from which the retaking, by the former and true owner, will not of itself relieve him. If, after such retaking, he will be in all respects in the same condition as if he had made no such contract of purchase, he is not a *bona fide* purchaser, having title paramount to that of the true owner.

Here, it cannot be said by the court that the defendants are proved to have paid any money, or incurred any such liability. Upon the facts now appearing, if the plaintiff be the owner as between him and Cox, the defendants can never be required to pay him for the oats, and they have given no property or securities, negotiable or otherwise, therefor. Unless we can say that they are liable for one-half the measurer's fees, they can suffer no prejudice; and on that subject the evidence in the cause indicates that those fees are paid, in the first instance, by the seller, and, if so, he can no more collect them, under the circumstances proved, than he can the price of the goods.

The case must therefore be decided by determining whether the

court is warranted, by the evidence, in saying that Cox acquired a valid title as against the plaintiff, for if the testimony was such as to require the submission of any question of fact to the jury, a new trial must be ordered.

If the purchase by Cox was a fraudulent device to obtain the possession of the plaintiff's oats and sell them, applying the proceeds to his own use, knowing that he was about to fail in business, and without any intent to pay for the oats according to the terms of the contract of purchase, then, however absolute and unqualified the delivery to him may have been, he acquired no title.

On Tuesday night he instructed his agent to purchase eight or ten thousand bushels of oats for cash on delivery (or on the usual terms, which imports the same thing). He gives no direction or limitation as to price. The purchase is made on Wednesday at the plaintiff's price. The delivery into his boats is completed on Saturday. Before 12 o'clock on Monday, he had suspended payment; and yet on Monday morning he had delivered three thousand seven hundred bushels on ship-board; he had, in some manner, disposed of at least five hundred bushels from his boat, the *J. P. Whiley*, and on that day commenced the delivery of the residue contained in that boat to these defendants; and when called upon by the plaintiff for payment, nor at any time after, so far as appears, not a word of explanation is given, or attempted, and no fact shown indicating any failure in his expectations, or any misadventure or accident preventing payment. And on the trial no proof is offered to show that his suspension was caused by circumstances over which he had no control, or to indicate that he was not aware some short time, at least, before his actual suspension, that such event was unavoidable. It is true that a failure in business is sometimes sudden and unexpected to the party himself, but when so heavy a purchase is made, and so immediate a disposition of the property follows the act of suspension, without an offer to return the property for which instant payment was due, and which had hardly come to his control, and when a very slight sense of justice would have prompted an offer, at least, of the proceeds of the sale, it seems not too much to say, that there is some evidence of fraud in the whole transaction. So long as the oats were not measured the title remained in the plaintiff, and the delivery was not completed until Saturday morning. In the

absence of all explanation, it would be no violent presumption that when Cox took the possession, and removed the goods after that time, he knew he could not pay, and did not intend to pay, according to his contract. We are aware that this evidence is not conclusive, but whatever suggestions may be made, or hypothesis proposed, to diminish the force of the circumstances indicating fraud, we think the evidence clearly sufficient to be submitted to a jury, and to call for some explanation or rebutting evidence.

Again, if the delivery by the plaintiff was a conditional delivery, as mutually understood and intended by the parties, Cox acquired no title, as against the plaintiff, without payment of the price. On this point there is no difficulty in declaring the rules of law, though there may be some in applying them to the evidence given on the trial. It may be said, in general terms, that no man shall be held to part with his title to his vendee without his own voluntary consent to do so; but on the other hand, a man is deemed to consent to the legal consequences of his own voluntary acts. When a sale is made for cash, to be paid on delivery, the title does not vest in the purchaser by the mere fact of manual delivery, unless the purchaser performs the condition, or the seller waives such performance. In general, delivery and payment are to be simultaneous acts; but in strict order of time, the seller must complete the manual delivery before his title to the money is complete; that is, he must perform the condition on his part; and where goods are of great quantity, requiring considerable time to deliver, it is not until the whole have passed through the process of delivery that the seller can demand any thing, but his lien continues, and his right to resume the actual possession is perfect unless payment is made, and until he waives the condition; and, on the other hand, if the delivery be absolute and without any circumstances indicating an intent that the title should not pass, such delivery vests the title though the condition be not performed.

Where the circumstances are such that the acts of the seller neither indicate an intent to make the delivery absolute, nor to part with the title without payment, and where an intent to insist upon the condition may have effect, in consistency with the acts of the party, the condition should not be deemed waived. In such case the vendor should not be held to have invested the vendee with the title if he never intended to do so. On the other hand,

when a delivery is made without any cotemporaneous qualification, the vendor must be required to show affirmatively on his part, acts, circumstances, or previous declarations from which it may be clearly inferred the condition was not waived, for the delivery will be deemed conditional if such was the intent of the parties, though not so declared at the time in express terms.

These principles are deducible from numerous cases in this state and England, and are reasonable and just. Indeed, they would not probably be denied by the counsel in the present case. (See *Smith v. Syms*, 1 Selden, 41, S. C., 3 Sand, 203; *Caldwell v. Bartlett*, and *Keyser v. Harbeck*, *supra*, and the numerous cases cited in each; *Van Neste v. Conover*, 20 Barb. Sup. C. R. 547; *Ives v. Humphrey*, 1 E. D. Smith R. 196.)

In the case before us, the evidence was that the sale was for cash on delivery. The oats were first to be measured, and the delivery was to be actually completed before the payment was due, and if such payment was not then made, the title did not pass; it was upon that condition only that the property was to become Cox's property. Was this condition waived? The agreement was, that the oats should be taken to some pier up the East River, to be there measured; the measurer was sent on board, and the work of measuring progressed until Saturday morning. It does not appear that the vendor was present; the measurer's return did not reach him certainly before three or four o'clock on Saturday afternoon, and it seems probable that he did not personally see it until Monday morning. At all events, it was after the usual hour of making and receiving payments on Saturday when it reached his store. On Sunday, of course, there was no opportunity to demand payment; on Monday, at twelve o'clock, he presented the bill, and demanded payment. His delay even to that hour is explained by the fact that there was a wide discrepancy between the quantity returned by the measurer and the quantity the parties supposed to be in his boat, and, as it seems from the evidence, the actual quantity sold. He had been in the morning engaged in an endeavor to find out the mistake in that respect. It does not appear that until so engaged he had any actual knowledge that the oats had been removed from the place of measurement, if indeed they had down to that time been removed. It does not appear that he at any time consented to such removal; and though

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it may be said, that the person in charge of his boat, from which the oats were measured, must be deemed his agent, it does not appear that he had any authority to consent to a removal of the oats, nor is an authority to waive the condition to be necessarily implied from any evidence given on the trial. Under such circumstances, it ought, we think, to have been left to the jury to say, whether there ever was, in fact, any absolute delivery to the purchaser Cox? If all that was done was consistent with an intent to insist upon the condition, or rather, if nothing that was done indicates that such condition was either actually waived or intended to be waived, the lapse of a few hours after the measuring was completed ought not to be deemed so clear evidence of waiver as to withdraw the question from the jury. And though it be conceded that a voluntary sole reliance upon the personal responsibility of Cox, and a voluntary giving to him a credit for some time, however short, after an unqualified delivery of the possession would have vested in him the title, we think that such a delivery and giving of credit were by no means clearly proved.

The nonsuit must, therefore, be set aside, and a new trial ordered, with costs (including the costs in the General Term) to abide the event.

TIMOTHY T. MERWIN, and another v. JEREMIAH G. HAMILTON.

A broker who is employed to purchase stocks, and is authorized by usage or by an express agreement, to make the purchase in his own name without disclosing the name of his principal, has no right to maintain an action against his principal for not furnishing him with money to pay for the stocks, without showing that he had demanded payment of the price and had transferred or offered to such principal the stocks he had purchased.

The transaction is in law precisely the same, and is governed by the same rules, that would have applied had the contract been an immediate sale from the broker as seller and his principal as buyer. The payment of the price and the transfer of the stocks are simultaneous acts and conditions mutually dependent. Hence, if the broker sells the stocks without demanding payment of the price, and without transferring, or offering to transfer them, to his principal, and without notice of his intention, thereby disabling himself from making the necessary transfer or tender, he in effect converts them to his own use, and loses any right of action against his principal that he might otherwise have had.

Held, upon these grounds, that each of the first four counts in the complaint was bad upon demurrer, as not stating facts sufficient to constitute a cause of action.

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The fifth count stated, as a separate cause of action, that they, the plaintiffs, reasonably deserved to have from the defendant for their commissions as stock-brokers, in making the said purchases of stock and in making other purchases and sales of stock, which they were employed by him to make, another large sum of money, etc.

Held, that these allegations, although not so definite as they ought to have been, and upon motion might have been required to be made, were sufficient upon demurrer.

Demurrer to the first four counts sustained. To the fifth overruled.

(Before DUER, SLOSSON, and WOODRUFF, J.J.)

Heard, November 10; decided, December 27, 1856.

APPEAL by plaintiffs from a judgment, at Special Term, allowing a demurrer to the complaint.

The complaint alleged that the plaintiffs on etc., at etc., were partners and stock-brokers; that by usage and custom, existing at the time of the transactions hereinafter mentioned, within the state and city of New York, and well known to the defendant, stock-brokers employed to purchase stocks for other persons, make such purchases in their own names, without disclosing their principals, and are personally liable for the performance of the contracts so made, and their principals are, as between them and the stock-brokers so employed, liable to perform the contracts of purchase so made in their behalf, and to indemnify and save harmless such brokers against their liability upon such contracts at the maturity thereof.

The complaint then, as a first cause of action, avers that the plaintiffs on etc., were employed to purchase, and did purchase for him, in accordance with such usage and custom, from certain persons named, one hundred shares of the capital stock of the New York and Erie Railroad Company, at \$69 $\frac{1}{2}$ per share, payable on the delivery of the stock at the option of the buyer within 60 days after such purchase, whereof the said defendant had due notice. Yet, the said defendant did not perform the said contract at or before the maturity thereof, and did not accept a delivery thereof or pay the price; and did not indemnify and save harmless the plaintiffs against their liability upon the said contract at the maturity thereof; whereby the said plaintiffs were compelled to, and did, at the expiration of the time limited, accept from the vendors a delivery, and did pay them therefor the agreed price, amounting to \$6980 $\frac{1}{10}$; that the said stock had then greatly de-

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olined in value, and was not and never since has been, worth the sum so paid by a large amount, whereby the plaintiffs have been, and are, greatly injured and damnified.

The complaint proceeds, as a second, third, and fourth cause of action, to set out other purchases of other stocks from other parties, upon the like employment with like averments, in respect to each as contained in the amount of the first cause of action.

The fifth cause of action consists in an averment that the plaintiffs reasonably deserve to have from the defendant for their services, as such stock-brokers, in making the said purchases of stock, and other purchases and sales of stock, which they were employed by the defendant to make, and which they did make, as his brokers, during the said year of 1854, a large sum of money, to wit, the sum of \$115 or thereabouts, and that the said defendant hath not paid the said commissions, or any part thereof, to the said plaintiffs.

In conclusion, it is averred, that all the said stocks have been sold by the plaintiffs for the best prices they could obtain, and for all they were worth at any time between the maturity of the several contracts of purchase and the times of such sales, and after crediting the proceeds of sales, a large balance of the said sums, so paid by the plaintiffs on account of the defendant, remains due to them, to wit, \$3573³⁶/₁₀₀, besides the said commissions and interest, whereupon the plaintiffs pray judgment, etc.

To this complaint, the defendant demurred generally, that the complaint does not state facts sufficient to constitute a cause of action; and specially, to each of the said alleged causes of action, that the facts alleged in respect to the same are not sufficient to constitute a cause of action.

On the trial of the issues thus presented, at the Special Term, judgment was ordered for the defendant upon the demurrer, with leave to the plaintiffs to amend within twenty days, on payment of the costs of the demurrer.

From this order the plaintiffs appealed to the General Term.

J. Larocque, for the appellant,

Insisted that the defendant, having had notice of the purchases, and having given to the plaintiffs no notice of his dissent there-

from, the plaintiffs had a right to treat them as binding contracts, and he not having forbidden them to perform them, or given notice that he should insist upon their invalidity, but left the plaintiffs to go on and perform them, he is now estopped from insisting that they were invalid if not in writing, or, if within the act in relation to stock-jobbing. That even if the contracts were not valid, the plaintiffs were under an honorary obligation to perform them, and, in the absence of such notice from the defendant, might do so, and hold him responsible to themselves for their indemnity. (1 Mees. & Welsb., 511; 4 Scott R., 489; 8 T. R., 610; 1 Mass. R., 139; 11 Mass. R., 359; 6 Shep., 79; 2 Johns. Ca., 424; 13 Johns. R., 58.) It was not, therefore, necessary to aver in the complaint that the contracts of purchase were in writing, nor to state facts showing their validity under the said act.

Even if, under the Code, it be necessary, (in declaring on a contract, which is required by the statute of frauds to be in writing,) to state in the complaint that it was in writing, which the plaintiffs' counsel denies, that rule does not require such averment in the present case, where the contract sued upon is an agreement to indemnify for which the employment of the defendant and the purchases by him are the consideration or inducement.

That the defendant's contract was broken by his not performing the contracts of purchase, and the right of action complete at the maturity of such contracts. And the plaintiffs had a right to sell the stocks for their own indemnity, and without further notice to him. And if the defendant was entitled to notice, or to a tender of stocks, the omission wrought no prejudice, since the stocks brought their full value. (3 Comst., 78; 17 Wend., 91.) And, finally, that the claim of the plaintiffs to commissions is sufficiently stated in their fifth cause of action.

David D. Field, for the respondent,

Insisted that if the plaintiffs had paid for the stock, they had done so in their own wrong, because it did not appear that the contracts of purchase were in writing, or that the sellers of the stocks owned or had authority to sell them. (1 R. S., 710, §§ 6, 7, 8; 2 R. S., 136, § 3; 2 Duer, 609; 1 Kern., 437; 1 Parsons on Contracts, 392, 3, 4.)

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That if the contract had been legal, the employment of the plaintiffs by the defendant to purchase as his brokers, furnished no reason why the plaintiffs should render themselves personally liable to the sellers, and take from him the right to settle his own affairs. There being no averment that he authorized them to buy in their own names, or to conceal the name of the defendant. The averment of the usage and custom in the complaint, and the consequences, therefore, are here only statements of legal conclusions, and not of facts.

That the plaintiffs, having taken the legal title to the stocks to themselves, and having sold the stocks without notice and without a tender thereof, or an offer to transfer the same to the defendant, cannot call upon him to pay the price, or any part of it. (1 Kernan R., 453.)

And, finally, the facts alleged as constituting the fifth cause of action are insufficient.

BY THE COURT. WOODRUFF, J.—It is not necessary for us to consider the question, whether, if the purchases made by the plaintiffs for the defendant, were in truth made from persons who neither owned any stock at the time nor had authority from any person who did own stock, the defendant would be, nevertheless, liable to the plaintiffs under any obligation to indemnify them against losses sustained by them by performing what they might deem an honorary obligation. When it becomes necessary to decide that question, the case of *Ward v. Van Duzer* in this court, (2 Hall, 162,) *Gram v. Stebbins*, (6 Paige, 124,) and *Gould v. Staples*, (5 Sand., 411,) will, perhaps, suggest views which may properly affect the decision.

Nor in the view hereinafter taken of the rights of the parties will it be necessary to decide whether it is in general necessary, in declaring upon a contract, void by the statute of frauds if not in writing, to aver in the complaint that such writing exists; upon which question we do not intend to intimate here a dissent from the decision at the Special Term, (reported 2 Duer, 609, and Id. 626).

Nor whether, if such be the general rule, it is necessary for an agent, in a case like the present, who sues to recover indemnity, to aver that the contract made by him for his principal, and performed by him on behalf of his principal, was a contract in writing.

The present case may be disposed of, we think, upon another ground, in considering which, let it be assumed that the usage and custom exists which is averred in the complaint, and that it was known to, and binding upon, the defendant, and that the legal conclusions stated in the introductory part of the complaint are as therein alleged, viz.: that stock-brokers employed by other persons to purchase stocks, make such purchases in their own names, without disclosing their principals; that such brokers are personally liable for the performance of the contracts of purchase so made; that their principals "are liable to perform the contracts of purchase" so made in their behalf, and to indemnify and save harmless such brokers against their liability upon such contracts, at the maturity thereof; that the plaintiffs are stock-brokers, and, as such, were employed by the defendant to purchase the stocks mentioned in the complaint, and did purchase the same for him, as therein alleged, and gave him notice of such purchases in due season; and let it be further assumed, that such contracts of purchase were in writing, and that, at the time of such purchases, the respective vendors were owners in their own right of the shares sold, and in the actual possession of the certificates thereof.

This presents the case no more strongly in favor of the plaintiffs than if the defendant had expressly authorized the plaintiffs to purchase the stocks for him, in their own names, without disclosing his name as principal, and had in terms agreed that he would perform the contract of purchase, and would indemnify and save them harmless against the liability upon such contracts which, in such case, the law (irrespective of any usage or custom) imposes upon them, at the maturity of the contracts respectively.

In either case, whether this relation of the parties is established by express agreement, or by the alleged usage and its legal consequences, certain propositions may be stated that are obvious.

First, The plaintiffs, by reason of their acceptance of such employment, are not as between them and their principal bound to advance any money for him. They may insist upon his performing the contracts so made, by accepting the stocks when they shall be tendered for delivery and making payment therefor; or, they may, if they so elect, (still concealing the name of their principal,) perform the contracts themselves, accepting a transfer of the stocks and paying the price in discharge of their own liability. This

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election may be conceded to them as reasonably resulting from the authority to contract in their own names, and make themselves liable to the sellers of the stock.

Second, On the other hand, the defendant was not bound to part with his money without at the same time receiving the stock. If he were dealing in person with the sellers, they must tender him the stock—payment and delivery would be simultaneous acts. (*Green v. Reynolds*, 2 J. R. 207; *Jones v. Gardner*, 10 J. R. 266; *Porter v. Rose*, 12 J. R. 209; *Parker v. Parmele*, 20 J. R. 135; *Dunham v. Mason*, 4 Seld. 513; *Lester v. Jewett*, 1 Kern. 453, and cases there cited. Nothing in the circumstance that he employed the plaintiffs to purchase the stock for him, deliverable at a future day, implied an obligation on his part to entrust to them the money in reliance upon their fidelity in transferring to him the stock after they should receive it. They were, of course, at liberty to decline the employment, and to refuse to incur any hazard by making the purchase for him without the money in hand, or unless he expressly agreed to furnish the money to them, with which to pay for the stock when it should be tendered to them. But this obligation does not result from his employing them to make the purchase. The complaint itself does not allege any such agreement, nor at all proceed upon the ground that he was bound to furnish to them the money, or treat his neglect to do so as a breach of his obligation or duty. It was conceded by the counsel for the plaintiffs, on the argument, that down to, and on the very day of the maturity of the contracts, there was no obligation on his part to pay the price to any one without a contemporaneous delivery to himself of the stocks purchased; and whether so conceded or not, such was his position.

The necessary result of these propositions is, that the plaintiffs should either place the defendant in a situation in which he could receive the stock from the sellers and pay to them the price, or else receive the stock themselves, and tender them to him. It does not appear by the complaint that the stocks have been offered to him by any one, nor that the defendant was furnished with, or even offered any vouchers, authority, or evidence, of his interest in the purchases, which would have enabled him (if so disposed) to demand or receive the stock from the sellers. The plaintiffs preferred still to conceal their principal from the sellers, and per-

form the contracts themselves for him. Having done so, it was their duty to offer him the stocks, or, at the least, to hold themselves in readiness to transfer the same to him upon payment of the price, with their commissions. The duties resulting from their acceptance of such employment embrace in such case this duty to transfer to him on receiving the money. They hold the legal title;—an affirmative act of transfer is necessary before the defendant can derive any benefit from the agency of the plaintiffs, to which benefit he is entitled upon making payment on his part.

The plaintiffs, having performed the contracts and received transfers of the stock, may be regarded as in the same situation as if the defendant, on a given day, had directed them to go into the market and purchase shares of stock for him for cash, and they had done so, paying therefor and receiving the transfers to themselves. The defendant would be bound, and they might require him to repay the money and receive a transfer from them. But they could not require him to pay the money if themselves were not in readiness to confer on him the title to the stock they were employed to purchase.

In such a case, and equally so in the case shown by this complaint, the plaintiffs might have caused the stock to be transferred by the sellers to the defendant, and then their action for money paid to his use would have been, (laying all questions regarding the validity of the original contracts out of view,) simple and obvious. And if, for their own security, they preferred to cause the transfer to be made to themselves, they cannot thereby place the defendant in any worse situation in regard to his right to have the stock on payment of the money.

Instead of offering the stock to the defendant, and without even giving him notice that the stock had been delivered, as appears by the complaint, they sold the stock. They neither demanded from him the payment of the money they had advanced, nor gave him notice of the sale. They have disabled themselves to deliver the stock to him, and in effect converted the stock to their own use; thus placing the stock beyond his reach, without tender or notice to him. This is a complete defence to their claim upon him for the price of the stock.

It is argued that their sale and disposition of the stock, without

notice or tender or demand, is at most only a ground of counter-claim on his part for damages for the appropriation of his stock, that he is bound to pay to them the money they have paid for him, whether he receives the stock or not; that his duty to pay is unconditional.

Such is not the true aspect of their relation to each other. Having taken the transfer of the legal title to themselves they could not call upon him to place himself in their power; their duty to transfer that title to him, and his to pay, were reciprocal and dependent.

But it is further argued that the defendant broke his agreement by not himself paying and receiving the stock on the day the contracts matured, and for that purpose seeking out the plaintiffs and attending with them. This suggestion has already been sufficiently answered. They have never placed him in a situation in which he could perform the contracts himself and receive the stock from the sellers; nor has the defendant been put in default by a tender of the stock, or even an offer to transfer the legal title thereto upon payment of the price.

These views seem to us to fully sustain the order appealed from, so far as relates to the first four causes of action. It is by no means clear that the same result would not follow if it were conceded that immediately upon receiving the stock from the sellers and making payment therefor, the plaintiffs, without demand or tender on their part to the defendant, might have brought their action. Would it not have been a sufficient defence to such an action, that before suit was brought the defendant tendered the price paid, with interest and commissions, and demanded the stock, and the plaintiffs refused to transfer the title to him? And if so, when it appears by the complaint that the plaintiffs have sold the stock, and so have rendered such a tender and demand unavailing, is not such tender and demand waived, and the defence established by the complaint itself?

It does not, however, follow from what has been said, that the demurrer to the fifth cause of action, is well taken. The sufficiency of the averments of the complaint in this respect, was not discussed at length, though the counsel for the defendant very briefly stated the point orally in his discussion.

Laying out of view so much as relates to commissions upon the

purchases of stock, mentioned in the other part of the complaint, this fifth cause of action reads, in connection with the introductory part of the complaint, thus:

That the plaintiffs, at the time hereinafter mentioned, and before and afterwards, were partners and stock-brokers at, etc., and that they reasonably deserve to have from the defendant for their services, as such stock-brokers, in making other purchases and sales of stock, which they were employed by the said defendant to make, and which they did make as his brokers, during the year 1854, a large sum of money, to wit, the sum of \$115 or thereabouts, and that the defendant has not paid the said commissions, or any part thereof, to the plaintiffs.

Here is an averment that the plaintiffs were employed by the defendant to make purchases and sales of stock; that they made such purchases and sales as his brokers; and that they deserved to have for their services therein, a large sum of money, to wit, etc.; and that the defendant has not paid them. Since the decision of the Court of Appeals in *Allen v. Patterson*, (3 Selden, 476,) we cannot say that here are not facts enough stated to entitle the plaintiffs to recover. If the facts alleged were proved on the trial, they must have judgment. No doubt the complaint is greatly deficient in particulars, which, upon a proper motion, the plaintiffs would be required to supply, but the facts, which are necessary to a statement of a cause of action, are there, and this is the only ground of demurrer assigned.

The order appealed from, in so far as it sustains the demurrer, to the first, second, third, and fourth causes of action, must be affirmed, with \$10, costs of the appeal, and with the same leave to amend, and upon the terms mentioned in the order appealed from.

And so far as it sustains the demurrer to the fifth cause of action, it must be reversed and judgment thereon be entered for the plaintiffs, with leave, however, to the defendant to withdraw the demurrer, and answer within twenty days, if so advised.

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JOSEPH W. DAVIS v. ELI HOPPOCK.

When, in an action to recover damages for the unlawful conversion of personal property, the issue made by the pleadings is, whether the plaintiff, at the time of the alleged conversion, was the owner of the property, and as such entitled to its immediate possession, it is competent to the defendant to show that the legal title was at that time vested in a third person, and that the plaintiff was not in the possession.

(Before DUKER and WOODRUFF, J.J.)

January, 1857.

APPEAL by the defendant from a judgment in favor of the plaintiff, for \$1542.76 and costs, founded on the verdict of a jury for that amount.

The cause was before the court upon a case containing all the evidence given on the trial, and the exceptions then taken by the counsel for the defendant.

The action was brought to recover damages for a wrongful conversion by the defendant of certain goods and chattels, particularly described in the complaint; and the complaint averred that, at the time of the alleged conversion, the plaintiff was the owner and entitled to the immediate possession of the goods and chattels so described.

The answer (*inter alia*) denied that at the time of the alleged conversion, the plaintiff was the owner and entitled to the immediate possession of the goods and chattels mentioned and described in the complaint.

Upon the trial, the plaintiff proved that the goods in question had been taken possession of, and sold by the defendant, and that he, the plaintiff, some years before, had purchased the same at a sheriff's sale, under an execution against persons who were then in possession as owners.

Evidence was also given on the part of the defendant to show that the title so acquired by the plaintiff, by an arrangement between him and the former owner, had ceased before the seizure and sale of the goods by the defendant.

When the testimony on the part of the plaintiff was closed, the defendant offered to show that, at the time of his alleged conver-

sion, the title and right of possession to the property were vested in one Mrs. Frances Jackson; that her husband was in possession as her agent or tenant, and that he the defendant had sold the property with her knowledge and consent, under a mortgage which she had given to him to secure certain advances made by him to her husband.

The counsel for the plaintiff objected to this proof, and the court excluded the same, and ruled substantially, that the only proof open to the defendant, under the pleadings, was to contest the taking of the property, or any part of it, and to show the value of that which had been taken.

To this ruling the defendant's counsel excepted.

When the testimony on both sides was closed, the counsel for the defendant offered to argue to the jury the question of the plaintiff's ownership of the property as against the defendant.

To this the plaintiff's counsel objected, and the court ruled that the question was not open to the jury.

To this decision the defendant's counsel excepted.

When the counsel on both sides had summed up, the court charged the jury, "That the only question for them to consider was, the value of the property taken by Hoppock; that the defendant could not go into the question of ownership under the pleadings; that the question of value was for them to decide under the testimony, and that they must give the plaintiff a verdict for what they deemed the fair market value of the property."

To this charge the defendant's counsel excepted.

It was under this charge that the jury gave the verdict that has been stated.

C. W. Sandford, for the defendant,

Upon the exceptions that have been stated, and upon others stated in the case, insisted that the judgment ought to be reversed, and a new trial be granted.

W. M. Evarts, for the plaintiff, *contra*.

BY THE COURT. DUER, J.—It is not necessary now to determine whether it was competent to the defendant to show under

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the pleadings that he was himself the owner of the property in question at the time of its alleged conversion, but we are clearly of opinion that it was competent to the defendant to show that the plaintiff was not the owner of the property, and as such entitled to its immediate possession at the time mentioned in the complaint. It was this issue that the pleadings raised, and which the complaint tendered by express words, and it was upon the truth of the allegation in the complaint that the plaintiff's right to maintain the action was entirely rested; to maintain his action, he was bound to prove the truth of the allegation, and we see no reason to doubt that the defendant, under the denial in his answer, was legally entitled to contest its truth. The case is not analogous to those in which the averment in a complaint of the ownership of the plaintiff is a mere conclusion of law from facts previously stated, and therefore not the proper subject of an issue. The averment in this complaint is not a conclusion of law, for no facts are stated from which such a conclusion would follow. It is not a conclusion of law but the affirmation of a fact, the truth of which the defendant, by not denying, would have admitted, and thereby have released the plaintiff from the necessity which the complaint imposed upon him of proving it upon the trial.

We are also of opinion that, under the denial in the answer, it was competent to the defendant to disprove the allegation in the complaint by showing that, at the time of the alleged conversion of the property, the ownership and right of possession were not in the plaintiff, but in Mrs. Jackson. As it had been proved that the plaintiff was once the owner of the property, the proof that was offered that he was not the owner at the time of the alleged conversion, was exactly of the character by which the denial in the answer could alone be sustained. To reject the offer was to treat the denial in the answer as irrelevant and immaterial. We think the proof ought not to have been excluded, and that its exclusion was error.

We also think that the defendant's counsel was entitled to go to the jury upon the question, whether the title which the plaintiff had acquired was not subsequently divested by an executed agreement between him and the former owners of the property? There was a real conflict in the evidence upon this question, and that on the part of the defendant had been received without ob-

jection. We think that the question was material, and, as such, ought to have been submitted to the determination of the jury. The charge of the court was, therefore, erroneous in submitting to the jury, as the only questions in the cause, the taking and value of the property.

For these reasons, without adverting to other exceptions, the judgment for the plaintiff must be reversed, and there must be a new trial, with costs to abide the event.

JOHN WARD *v.* JAMES GAUNT and JAMES L. DERRICKSON.

The plaintiff purchased of the defendants the one-sixth of 66 bales of cotton, for which he paid them in full. The purchase was made in Boston, under an agreement that the cotton should be delivered at New York, and be there sold on account of all the owners, and be divided between them. When the cotton arrived in New York, the defendants, instead of making a sale or division, by mistake, and without the consent or knowledge of the plaintiff, sent it out of the state to a manufactory belonging to themselves in New Jersey.

Held, that the agreement did not constitute all who were interested in the cotton partners, so as to preclude the plaintiff from maintaining an action against the defendants alone for the eleven bales, or their value, to which he was entitled. The defendants, by not delivering the cotton in New York according to their agreement, rendered themselves separately liable.

Some time after the defendants had discovered their mistake in sending the cotton out of the state, they offered to bring back and deliver to the plaintiff the bales to which he was entitled,

Held, that, under the circumstances of the case, the plaintiff was not bound to accept the offer.

Judgment for plaintiff.

(Before OAKLEY, CH. J., DUEK and SLOSSON, J.J.)
January Term, 1857.

THIS was an action to recover the value of eleven bales of cotton, which the plaintiff alleged that he had purchased from the defendants, and they had neglected to deliver according to the terms of their contract.

The cause was tried before Woodruff, J., and a jury, in May, 1856, and the jury found a verdict for the plaintiff for \$294.92. The verdict was, however, taken subject to the opinion of the court at General Term, upon the validity of the exceptions of the

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defendants to the ruling and charge of the Judge. Judgment in the mean time to be suspended.

All the material facts established by the evidence, and by the verdict of the jury, are fully stated in the opinion of the court.

There was a conflict in the evidence upon the trial, as to the terms of the contract under which the plaintiff claimed, and as to the persons interested therein, and when the testimony was closed the counsel for the defendants requested the court to charge the jury,—

1. That the plaintiff could only recover upon proof of a specific sale of eleven bales of cotton, or one-sixth of sixty-six bales of cotton. 2. That if any purchase was made by the plaintiff of eleven bales, or one-sixth of sixty-six bales, it was made by him in partnership with others, and this action could not be maintained. 3. That the plaintiff never having paid or offered to pay any portion of the expenses of the transportation, &c., to New York, he cannot recover. 4. That the defendants had a lien upon and a right to retain the whole of the sixty-six bales, until their charges and expenses on those bales were satisfied. 5. That there was no evidence of a demand for a division of the sixty-six bales, nor for eleven bales, and that such a demand was essential to the plaintiff's right to recover. 6. That upon the evidence, the bidding off by Gaunt was the act of all the parties, through the one to whom that duty was delegated. 7. That by the agreement of the parties, the defendants had a right to retain the sixty-six bales, for the purpose of a sale, until all the parties agreed to divide it and not sell. 8. That there was not evidence in the case sufficient to justify the jury in awarding damages beyond the mere price of the eleven bales. 9. That the plaintiff was bound to pay his one-sixth of all the expenses upon the whole three lots of cotton bought by the parties.

His honor, the Judge, refused so to charge in relation to the several propositions aforesaid, otherwise than is hereinafter charged, to which refusal the defendants' counsel duly excepted, and insisted upon each of the said propositions severally and respectively.

His honor, the Judge, then charged the jury as follows:

I. If the plaintiff, after the defendants had bought the cotton, purchased in Boston from the defendants one-sixth of the lot of sixty-six bales to be brought to New York, and here either de-

livered to the plaintiff, or one-sixth of the proceeds thereof paid to him if sold, and the plaintiff paid the defendants for it on that understanding, and the cotton arrived in New York and came to the possession of the defendants here, and was by the defendants sent out of the state, the defendants are liable for a violation of the right of the plaintiff to have such a division or sale. If the plaintiff has made out that case, the defendants are liable for one-sixth of the value of that cotton, less one-sixth of the expenses of bringing the cotton to New York. I do not recollect that there is evidence that damaged cotton rose in price. It is argued that you may infer a rise in damaged cotton from a rise in sound cotton. I do not so understand it. It does not appear that damaged cotton has any market or market price, and many circumstances might well happen to glut the market with damaged cotton and reduce its price, while sound cotton would be rising. I will not, however, withdraw that question from you.

II. If, on the other hand, before the cotton was purchased by the plaintiff, the six parties agreed to unite in a joint adventure, for the common benefit, in which each was to contribute his proportion and each to share in the result, this forms that description of joint undertaking or adventure which we cannot settle in this action. It becomes a sort of partnership, and that cannot be settled without the other parties, and this action is not maintainable.

G. Stevenson, for the plaintiff, now moved for judgment on the verdict.

N. B. Hoxie, for the defendants, insisted that the exceptions taken on the trial ought to be sustained, and that there should be a new trial, or the complaint be dismissed.

BY THE COURT. SLOSSON, J.—It seems to me that the right of this case, with some slight modification in the amount of the verdict, has been attained by the result of this trial.

The agreement between the parties was, that the cotton, on its arrival in New York, should either be sold or be divided in equal shares. At this time there were only four parties in interest, the plaintiff represents one-sixth, the defendants one-sixth, and Wood four-sixths. The cotton consisted of three parcels: one of sixty-

six bales, which was the poorest of the lot, being damaged, and the other two consisting together of two hundred and fifty-two bales.

The plaintiff had paid defendants for his full share of the cost of the whole three hundred and eighteen bales. After the arrival of the two hundred and fifty-two bales in New York, the plaintiff and Wood proceeded to divide it, without, so far as the evidence shows, the knowledge of the defendants. Wood took five-sixths of this lot, though entitled to but four-sixths, as his full share of the whole three hundred and eighteen bales, though he says he is entitled to two bales out of the sixty-six to make up his full quota, and so he would be if the bales were all of equal value, as, numerically, five-sixths of two hundred and fifty-two bales falls short by two bales of four-sixths of three hundred and eighteen bales.

In this division, the plaintiff got his one-sixth of the 252 bales only.

On the arrival of the sixty-six bales in New York, they were all received by the defendants, and sent by them to their mills at Trenton in New Jersey.

Had the defendants intended to insist on a sale of the whole three hundred and eighteen bales, or an exact division of the whole according to value, they should never have assumed exclusive ownership over the sixty-six bales, and sent them away. In any aspect, it was numerically 13 bales more than their full share of the three hundred and eighteen bales. Gaunt said they were sent by mistake, and he was willing to bring them back, and he claimed that he was entitled to a share of the two lots which Wood and plaintiff had divided. It may be that he was, but as plaintiff had got no more than his fair share of those two lots, the defendants should look to Wood, who saw fit to appropriate the best cotton, to make good his entire proportion of the whole. The plaintiff, meantime, is entitled to his one-sixth of the remaining sixty-six bales in order to complete his quota, having paid the defendants for his share of the whole three hundred and eighteen bales.

The defendants, in fact, have both his money and his cotton. The idea of a sale of the cotton, after its arrival in New York, appears to have been abandoned by all parties; by Wood and the plaintiff, for they proceeded to divide the two hundred and fifty-two bales; and by defendants, for they sent away the whole

sixty-six bales to their manufactory in New Jersey. If this was by mistake, as Gaunt says it was, the mistake should have been rectified by bringing back the cotton before suit; but that the defendants had no idea of a sale is further manifest from Gaunt's telling the plaintiff that he would send for the sixty-six bales, and he might have his eleven bales if he wished them. I do not think the plaintiff was bound to do this and take the risk of any deterioration in the cotton by its trans-shipment, etc.

If a division and not a sale of the entire lot was the result to which the parties came after the arrival of the cotton in New York, as I think is manifest from the acts and declarations of the parties, then the defendants, on making good to the plaintiff the cost price of the eleven bales, will have remaining in their hands the value of fifty-five bales, being in the number of bales two more than their share of the three hundred and eighteen. If Wood claims these two bales, it will be a question to be settled between them, whether this is or not a fair offset for the greater value of the bales which Wood took for his share; at all events, even if an account should become proper between those parties the plaintiff has no interest in the dispute, since he gets only his one-sixth of the good and the bad cotton in any event.

I think the defence savors somewhat of technicality in insisting that unless the transaction amounts to a literal purchase by plaintiff of defendants of eleven bales, the action must fail. I think the plaintiff was injudicious in declaring in that form, but the gist of the action is a conversion of the property by defendants, and the plaintiff has clearly, I think, established his right to the possession of it.

In one aspect it was a sale and purchase, for the cotton appears to have been originally bid off without any definite understanding as to the future disposition of it; the agreement for a division was made after the purchase of the cotton. Gaunt bid off the sixty-six bales and Wood the residue. Until the agreement for a division, therefore, each lot was the property of the one who bought it, and the sixty-six bales belonged to Gaunt (the defendant). The agreement to pay and divide in equal shares, was, therefore, in legal effect, an agreement by each to purchase and pay for an aliquot share.

The Judge, in putting the case to the jury in the aspect of a

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sale and purchase, presented the case as favorably for the defendants as it could be done, especially when so presented in connection with the alternative aspect of it as a mere partnership transaction requiring an account. The jury, in weighing the evidence, seem to have taken this view of the matter, and I do not think they were essentially mistaken.

The verdict is too large; there is no evidence of any rise in damaged cotton. It was admitted that there were twenty-nine thousand three hundred and seventy pounds in the sixty-six bales; this, at five cents a pound, is equal to \$1,468.50, of which one-sixth is \$244.75. This sum should be the basis of the verdict. Interest should be allowed on this sum from the time of the payment, and an adjustment of the expenses paid by each party as admitted by the case.

Unless the parties can agree on this, there must be a reference to the clerk to make the adjustment, and judgment then entered for plaintiff.

As no point was made of any of the exceptions taken in the progress of the trial, except on the motion to dismiss the complaint, I have not adverted to them, and in respect to the latter motion, it is covered by the foregoing opinion.

MARTHA GARNER, and others v. WILLIAM HANNAH.

"Ordinary and yearly taxes," stipulated in a lease to be paid by the tenant, do not constitute in law any portion of the "rent" reserved by such lease.

Where a lease, executed in 1843, six years before the establishment of the "Croton Department" under the croton water acts, but after the passage of the act for supplying the city of New York with pure and wholesome water, (1834,) contained a provision, that the lessee should pay "the ordinary and yearly taxes," *held*, that the annual water rent charged on the premises, according to the rates established by the Croton Department, is within the meaning of the covenant properly to be considered as embraced within that description of "taxes."

On a breach of the covenant for the payment of rent, in a lease containing the usual clause of re-entry, or the non-performance by the lessee of the covenant on his part, the lessee does not become a tenant by sufferance or at will; he continues tenant under the provisions of the lease, subject to the exercise of the right of re-entry by the landlord. Such right is asserted by the commencement of the action to recover the possession without actual entry, and without previous notice to the tenant to quit, and where the covenant broken is that for the payment of "taxes,"

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the right of action is perfect without a previous demand of the tenant of the payment of such taxes, or of the repayment to himself if he has paid them for his tenant.

The provisions of § 3 of the act of 18th May, 1846, entitled "An act to abolish distress for rent, and for other purposes," providing for fifteen days' notice to the tenant before making re-entry, do not apply where the right of re-entry arises on the breach of any other covenant than that for the payment of "rent."

The clause of re-entry, as applicable to the covenants for the payment of rent or taxes, or any other sum certain, is in equity treated as a security for the payment of money, and precise compensation can be made for the breach of it, and in such case, the court will, in the exercise of its equitable powers, relieve from a forfeiture, even after judgment in the action of ejectment, or such terms as may be just.

A motion for leave to file a supplemental answer, setting up new matter, for the purpose of equitable relief, cannot properly be made at the trial. Such motion must be made on notice, or order to show cause.

(Before OAKLEY, CH. J., HOFFMAN and SLOSSON, J.J.)

October 30, 1856; January 3, 1857.

MOTION on the part of the plaintiff for judgment on a verdict taken, subject to the opinion of the court at General Term upon questions of law.

The action was brought to recover possession of a lot of ground in 28th street, in the city of New York, and was tried before Bosworth, J., and a jury, in June, 1856.

The following are the material facts of the case, as they appear from the pleadings, and were established by the evidence on the trial.

The plaintiffs claimed that they were entitled to recover under a clause of re-entry contained in a lease made by one John Garner, the ancestor of the plaintiff, to Thomas Davis, of a lot in 28th street, dated the 1st of May, 1843, for a term of twenty years, and which was assigned by Davis to the defendant, on the 1st of October, 1850. The lot, when leased, was vacant, and a dwelling-house had been erected on the premises, in pursuance of one of the covenants of the lease.

The lessee covenanted to pay the yearly rent, and further that he would "from year to year during the term of the lease, pay or cause to be paid all ordinary and yearly taxes on said lot," and the lease contained the usual stipulation, that if any rent should be due and unpaid, or if default should be made in any of the covenants contained therein, it should be lawful for the lessor to re-

enter the premises, or to distrain for any rent that might remain due thereon.

It was admitted on the trial, (subject to an objection, that the evidence offered to prove it was inadmissible under the pleadings, the complaint being general in its form, and making no allusion to the lease or the default), that the taxes for the year 1854 had not been paid by the defendant, but that the same were paid by the plaintiff, in March, 1855, amounting, with interest, to \$30.30. It also was admitted that the defendant had omitted to pay the Croton water rent for the year 1850, in consequence whereof the property was sold in June, 1852, for one hundred years, for \$10.45, and that the plaintiff, on the 2d of March, redeemed the same, and paid on the redemption the sum of \$16.35, principal and interest. It was also admitted that the Croton water rents of 1852, amounting to \$8.05, had not been paid, and that the same was paid by the plaintiffs.

To show that he was surprised by the general form of the complaint, as to the true character of the plaintiff's cause of action, the defendant proved, that in June, 1855, after the commencement of the action, he made a search for unpaid taxes at the proper office, and that by the return on the search no taxes appeared to be unpaid, and to explain this, the witness stated that if a tax is paid by any person, or if the property has been sold for taxes and redeemed, the tax is not returned as unpaid, though the sale, redemption, and by whom redeemed, all appear in the sale book, and can be seen by any person examining.

It was admitted that there was, at all times, sufficient property on the premises to satisfy a distress for rent.

It was also admitted that the rent had been regularly paid up to the first of November, 1854, but there was no evidence to show that at the period of the payment of rent subsequent to the breach of the covenant, the plaintiff knew any thing of the breach.

It was proved, on the part of the defendant, that on the 9th of June, 1856, after the commencement of the suit, the defendant went to Ward, one of the plaintiffs, with \$200 in his pocket, and told him that he had come to pay the arrears of taxes, rents, and all other charges against the property, and that Ward replied that he knew nothing about the matter, and would not accept any thing.

A motion was made for a nonsuit, on the ground that no notice to quit, or of the landlord's intention to terminate the lease, had been given prior to the commencement of the suit; also for leave to amend the answer, by setting forth therein the defendant's offer to pay all rent and taxes in arrears, with all costs and charges thereon, with a prayer for equitable relief therefor, or to file a supplementary answer for such purposes, both which motions were overruled, and a verdict was directed for the plaintiff, subject to the opinion of the court, etc.

The complaint simply set out the plaintiff's title, alleged that the defendant was in wrongful possession, and unjustly withheld it from the plaintiffs, and demanded judgment.

The answer set up the lease, by the plaintiff's ancestor, to Davis, and its assignment by him to defendant, possession under it, and averred, generally, payment of rent when demanded, and that "all the ordinary and yearly taxes on said lot, which were required to be paid by said lessee, have been fully paid and discharged," and that all the covenants, on the part of the lessee, had been performed.

E. P. Voorhis, for plaintiffs.

J. Coit, for defendant.

BY THE COURT. SLOSSON, J.—I had occasion, in another action by the same plaintiffs against the tenants of other premises held under a similar lease, in which the pleadings were in all respects, in substance, like those in the present action, to consider the question of the sufficiency of a complaint in this form, under the Code, in connection with an answer setting up the lease and averring performance of its covenants. I held it, in that case, to be sufficient, and see no reason to change my views in that respect.

The objection to the evidence on that ground was, therefore, properly overruled.

It was contended by the defendant, on the argument, that all taxes which the tenant is bound by the terms of his lease to pay, are to be treated, in law, as part of the rent reserved, and that if this be so, the present action must fail, since, he contends, there

are but three modes in which ejectment for non-payment of rent can be sustained, to wit:

First, By a demand of the rent on the day it is due, under the old rule at common law.

Second, By proceeding under the provisions of 2 R. S. 505, giving a right to the action, where a half-year's rent, or more, is in arrear, and no sufficient distress is found on the premises to satisfy it.

Third, By proceeding under the provisions of the act of 1840, ch. 274, "to abolish distress for rent, etc.;" and that the case does not fall under either of these, since there is no pretence of a demand of the payment of the taxes (rent) by the landlord, nor of the giving of fifteen days' notice of the intention to re-enter, as provided by the act of 1846, and the case admits there was a sufficiency of distress on the premises, which would take it out of the provisions of 2 Revised Statutes.

To sustain these views, which are not without plausibility, he cited that provision of the general tax law, (1 R. S. 419, § 6,) which provides, in effect, that where a tenant has been obliged to pay a tax which the landlord was, by the terms of the lease bound to pay, he may recover it back from the landlord by action, "or retain it from any rent due," or accruing from him to the landlord. We see nothing in this provision which can properly be construed as sustaining this argument; it is a provision of convenience merely, by which the tenant is enabled, if he so elect, to obtain an early indemnity for the payment he has made out of a fund in hand, and without suit. Rent has a fixed legal meaning, and to consider all payments which, by the terms of a lease, a tenant is bound to make, as coming within its definition, would lead to a confusion of ideas without necessity or advantage.

It is said that the payment of taxes is part of the return made by the defendant to his landlord for the use of the property, and, therefore, properly comes under the definition of rent. But in one sense the performance of every covenant on the part of the lessee is a return made by the tenant for the use of the land. Yet it would hardly be contended that money stipulated to be expended in repairs or for insurance, or in the way of improvements, was any portion of the rent. Taxes, being payable annually, approach, it is true, to the idea and character of rent, which is a

certain yearly return reserved to the landlord in money, or kind, or service for the enjoyment of the freehold; but they are distinguishable from rent in this, that they are uncertain both as to amount and time of payment, and are payable not to the landlord but to the government, and are imposed for the benefit of the public, and the landlord may, by the terms of his agreement with the tenant, be relieved from their payment; taxes are not, on that account, any more rent than the expenditure of money for insurance, under a covenant to that effect on the part of the lessee.

The forfeiture in the present action is claimed on two grounds,

First. That the taxes for the year 1854 were not paid by the defendant.

Second. That the Croton water rent of 1850 was left unpaid, by reason whereof the premises were sold and the plaintiffs were compelled to redeem, for their own protection.

At the time the lease in question was executed, the Croton water had not been introduced into the city, and no such thing was known as a Croton water rent. The plaintiffs, however, contend that notwithstanding this, it became, from the time the rent was established in 1852, an "ordinary yearly tax," within the meaning of the covenant in the lease.

It is, perhaps, unnecessary to the support of the present action, that the plaintiff should establish this proposition, since there is a clear default by the nonpayment of the ordinary tax of 1854, but as the point has been made it may be well to dispose of it here.

The act for supplying New York with pure and wholesome water was passed May 2, 1834.

Various additional and amendatory acts were subsequently passed.

By the act of April 11, 1842, the corporation of the city were authorized "to organize a department, with full powers, for the management of such works (connected with the supply of the water) and the distribution of said water."

By the act of April 11, 1849, the "Croton Aqueduct Department" was organized, and the corporation of the city were authorized to establish, by ordinance, a scale of annual rents for the supply of the water, to be called "regular rents," and to be apportioned to different classes of buildings in the city, in reference to their dimensions, number of families or occupants, or consump-

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tion of water, etc., etc., and to alter, amend, and increase the scale from time to time; such rents, when established, are to be collected from the owners or occupants of the buildings situated on lots adjoining any street or avenue in which the distributing pipes are or may be laid, and from which they can be supplied, and they are made a charge and lien on said houses and lots respectively.

By the 21st section of the act, the President of the Croton Aqueduct Department is required, at the termination of each water year, to cause lists of the unpaid rents to be prepared with the names of the owners, etc.

By the act of 1851, to amend the act of 1849, (Sess. Laws of 1851, ch. 298,) these lists are to remain in the department until the 1st of January thereafter, for the purpose of receiving the arrears of rent. On the 1st of January in each year, the president of the department is to transmit to the comptroller a list of all unpaid water-rents for the preceding water year, and the comptroller is thereupon directed to advertise and sell the property on which said water-rents are a lien in the same manner as for unpaid taxes; and the rents so in arrear are made a lien on the property, to be collected and recovered by a sale of the premises as provided by law in the case of unpaid taxes in the city.

By section 28 of the act of 1849, it is provided that "For the collection of the water-rents to be imposed by virtue of the act, it shall take effect on the 1st of May, in the year after that in which the Common Council determines to carry its provisions into effect, and for the transmutation of the unpaid rents into a direct tax in the description of buildings to which they may be made to apply by ordinance of the Common Council."

This last clause is rather obscure in the order in which it stands, and should be read in immediate connection with the first clause of the section.

The Common Council, by ordinance approved 20th of March, 1851, established a scale of water-rents, as authorized to do by this act, fixing the rates upon the buildings of the city according to classes.

By the terms of the act, therefore, its provisions in respect to the collection of the rents took effect on the 1st of May, 1852. The property in question was sold in June following.

It will thus be seen that these rents possess many of the essential elements of a tax; they are general and annual, and imposed for a public purpose, and from the time of their imposition become both "ordinary and yearly" burdens; they constitute a lien on the property, and are collectable in the same manner as ordinary taxes; indeed, by non-payment they become, by the terms of the act of 1849, "transmuted into a tax." The tenant, moreover, derives all the benefit from the use of the water, and the payment of the rent by him therefore works no hardship.

I think, therefore, that they may fairly be considered as embraced within the term "taxes," within the meaning of the covenant.

But it is said, no such charge could have been in the contemplation of the parties, as the lease was made in 1843, and the Croton Department was not created till 1849; that it was, therefore, a tax not in use at the time the lease was executed, nor was it a tax of a like nature with any before imposed.

This is true, but the act for supplying the city of New York with pure and wholesome water was passed as early as May, 1834, and acts amendatory of it were passed in each successive year down to the period of this lease, and the possible, or even probable imposition of some charge on the property for the use of the water if introduced within the term demised, may fairly be presumed to have been within the contemplation of the parties.

The language of the covenant is, to pay "all ordinary yearly taxes." In the case of *Kearney v. Post*, (1 Sandf. R. 105,) this court held that a covenant to pay all assessments, etc., which should be imposed on the premises during the term, extended to assessments imposed under statutes passed subsequently to the lease, and the decision was affirmed by the Court of Appeals. (2 Coms. R. 394.)

If this, therefore, was an ordinary tax, as we have considered it to be, the case referred to is decisive on the point. (See also the cases of *Corporation of New York v. Cushman*, 10 J. R. 96.; *Bleecker v. Ballou*, 3 Wend. R. 263.)

The point most relied upon by the defendant is, that from the time of the breach of the covenant, the defendant was in the position of a tenant at sufferance, and could not, therefore, be ejected without a previous notice to quit.

If it had been a condition of this lease that, on a breach of any of its covenants, the lease should become void, and the defendant, after a breach, had remained in possession by permission, or by the laches of the landlord, he would have been either a tenant at sufferance or at will, as the case may be, and entitled to notice to quit before he could have been ejected; but the provision is, that on default of the tenant in respect to any of the covenants, the landlord may either re-enter or distrain. It is therefore, a lease not void, but voidable at the election of the landlord, and the estate of the tenant still continues, subject to the right of re-entry. (*Stuyvesant v. Davis*, 9 Paige R. 427; *Parmelee v. Oswego, etc.*, R. R. Co. 2 Selden R. 80.)

How is this election to be manifested?

The defendant contends it must be by a notice to quit.

The answer is, he is neither a tenant at sufferance, nor at will.

The object of a notice to quit is, to terminate the tenancy, and it is proper only in cases where no agreement exists between the parties, determining the period when, or the contingency on which, the tenancy shall cease. Such is the character of a tenancy at will or at sufferance, which are the only two cases in which notice to quit is prescribed by statute. A tenancy at sufferance is created by holding over after the termination of a lease or letting, without the permission of the landlord; but even then the tenant is not entitled to notice to quit, unless the landlord has permitted the tenancy to continue for such a length of time after the expiration of the term as to imply an assent on his part, and it has been held that three months was not sufficient, under certain circumstances, to create such implication of assent. (11 Wendell R. 616.)

If, in addition to the holding over, the landlord receives rent, it becomes an estate at will, or from year to year. Where either of these tenancies exist, or, in other words, where a tenancy exists not regulated and defined by express agreement between the parties, a notice to quit is highly proper, as a convenient and just mode of putting an end to it; it comes in place of an express stipulation between the parties. But where the parties have, by their own agreement ascertained and determined at what period the term demised shall terminate, a notice to quit is unnecessary, and a tenant holding over after such period may be proceeded against

by ejectment forthwith, unless the holding over continues, as before stated, for such a period as to imply assent to its continuance on the part of the landlord, or unless he receives rent, and thereby converts the tenancy into an estate at will. (*Rowan v. Little*, 11 Wend. R., 616; *Adams's Eject.* [Ed. 1854] 140, 1; 2 Serg. & R. Rep. 49; *Messenger v. Armstrong*, 1 T. R. 53; *Right v. Darby*, 1 J. R. 162; *Woodfall L. and T.* 177; *Taylor's Land. and Ten.* 44, 5; 4 Kent's Com. 118; *Graham's Prac.* 848; *Sander's Pl. and Ev. Tit. Eject.*; *Allen v. Jaquish*, 21 Wendell R. 631.)

The difficulty arises in applying this general rule to the case in hand. Where a tenant holds over after the termination of his term fixed by the agreement between the parties on a day certain, it will not be contended that he is entitled to notice to quit, except in the contingency of a continuance in possession for so long as to imply assent on the part of the landlord, but the breach of the covenant in question, not of itself working a forfeiture by the terms of the lease, the term does not cease at the moment of the breach. In what position is the tenant after the breach? He does not hold over, for the term has not ended, yet he has committed a default, by reason of which the landlord may re-enter and terminate the lease. The difficulty, however, is more seeming than real. The right to the ejectment arises at the instant of the breach; but it is a right which the landlord may or may not exercise. His election is determined by the commencement of the action without actual entry. (*Lawrence v. Williams*, 2 Duer's R. 587.) And from the moment of the election, the tenant is, in the eye of the law, a trespasser; until this exercise of his election by the landlord, the tenant continues tenant, under the terms of his lease, but liable to be ejected if the landlord elects to enforce the forfeiture already incurred; the question, thenceforth, becomes one of election to enforce or waive the forfeiture on the part of the landlord.

The forfeiture being claimed under a breach of the covenant for payment of taxes, was a demand of the taxes necessary before the right of entry occurred, as in the case of a forfeiture for non-payment of rent at common law?

In the case of *Jackson v. Harrison*, (17 J. R. 66,) in which the forfeiture was claimed for a breach of the covenant to pay taxes, as well as of that for the payment of rent, the court, Van Ness,

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Justice, says: "The plaintiff equally fails in showing a right of re-entry by reason that the defendant did not pay the United States tax, because the indispensably necessary step of making a demand of the defendants within the period required by law, in order to create a forfeiture, was not taken."

I concur with the learned counsel for the plaintiffs, in thinking this dictum of that eminent Judge, not well considered.

Where a forfeiture was claimed for the non-payment of rent, a demand of the rent must be shown, unless the proceeding is under the statute, (2 Revised Statutes, 505, § 31); but taxes, as has been shown, form no part of the rent, they are not payable to the landlord, nor on a day certain, and no demand could properly be made by the landlord of his tenant in respect thereto, except to repay what the landlord had been compelled himself to pay by reason of his tenant's default; this would be a demand for reimbursement merely, whereas the default which works the forfeiture, is the non-payment of the taxes to the government, and it is not perceived how a mere refusal to repay the amount expended by the landlord for taxes, could work a forfeiture, when no covenant of repayment is contained in the lease; if so, a demand of repayment can not be a necessary pre-requisite to the right of action.

Besides, the payment of the taxes by the landlord, in case of the tenant's default, is not necessary to his right of action; that is complete on the breach of the tenant's covenant; a demand of their re-payment by the tenant must, therefore, be unnecessary.

As this is not a case of default in the payment of rent, the statute of May, 1846, providing for a notice of fifteen days, in lieu of a distress, does not apply. Moreover, the statute is applied in terms to the case of a lease, reserving a right of re-entry "in default of a sufficiency of goods and chattels whereon to distrain;" whereas, the lease at bar contains no clause of distress whatever.

The defendant claims that, even if in strict right the plaintiff is entitled to judgment in the action, it is nevertheless a case in which equity, even after judgment, will administer relief on full compensation being made; and he contends that such relief may be given in the present suit, on his complying with certain conditions to be prescribed by the court, as payment of the taxes in arrear, interest, and costs. (Code, §§ 150, 274.)

On the trial he proved, without objection, that on the 9th of

June, 1856, (after suit commenced, and just before the trial,) he went to one of the plaintiffs with \$200 in his pocket, and offered to pay the arrears of taxes, rents, and all other charges against the property, but the plaintiff refused to accept any thing.

It may be admitted that this offer covered the costs of the action. Is the defendant entitled, on this state of facts, to any affirmative relief in the judgment to be rendered in the action under section 274 of the Code? I strongly incline to the opinion that he is not.

The "affirmative relief" to which the defendant may be entitled, under this section of the Code, means, I think, such relief as may properly be given within the issues made by the pleadings, or according to the legal or equitable rights of the parties, as established by the evidence, not to that redress which is equally applicable after as before judgment, and may be obtained on motion or by action. If, therefore, facts had been set up in a supplemental answer, would they have constituted a defence to the action, either legal or equitable? I apprehend not, for an offer of indemnity, and refusal to accept, cannot avoid the forfeiture; that is a right fixed by the contract; and all the court can do, by way of relief, is to stay the plaintiff's proceedings on compensation being made.

The defendant loses nothing for the want of a supplemental answer, for the proof is in, without objection, and we can pass on its sufficiency as a defence as well as though the facts had been pleaded.

That the defendant will be entitled to relief, notwithstanding judgment may pass against him, I think perfectly clear.

The court has equitable as well as legal jurisdiction of the actions of which it has cognizance, and I take the rule to be well settled, that equity will readily, where the breach is not willful, relieve from a forfeiture or penalty, as where the stipulation is intended as a mere security for the payment of money, and precise compensation can be made.

The following authorities will be found to sustain this doctrine: *Wafer v. Mocatto*, 9 Mod. R. 112; *Sanders v. Pope*, 12 Ves. R. 282; *Davis v. West*, 12 Vesey R. 475; *Hill v. Barclay*, 18 Vesey R. 55; *Reynolds v. Pitt*, 19 Vesey R. 133; *Baxter v. Lanning*, 7 Paige R. 350; Story's Eq. §§ 1314, 1315, 1319, 1321-2-3-4.

In the case of *Davis v. West*, above cited, which was a motion for an injunction to restrain execution on a verdict in ejectment, brought on a breach of the covenant for payment of rent, the Lord Chancellor referred to the authorities as establishing "that where covenants are broken, and there is no fraud, and the party is capable of giving complete compensation, it is the province of a court of equity to interfere to give the relief against the forfeiture for breach of other covenants, as well as that for payment of rent."

In *Skinner v. White*, (17 J. R.,) above cited, in the court of errors, Yates, Justice, says: "I cannot accede to the principle that a Court of Chancery is restricted in giving "relief to cases of absolute forfeiture or penalty only. Relief may be granted against the breach of an agreement, not willful or fraudulent, where full compensation can be made, so as to render the party perfectly secure and indemnified, and place him in the same situation as if the occurrence had not happened."

In England, as in this state, where the forfeiture rests on a breach of the covenant for payment of rent, the relief may, under a special statute, be obtained in the action at law without going into equity. (4 Geo. II., ch. 28; 2 R. S. 505, §§ 33, 34.)

In a similar action to the present, between the same plaintiffs and the tenants of another building owned by the plaintiffs, for breach of a precisely similar covenant, and to which I have alluded in the commencement of this opinion, (the case of *Garner v. Sykes*,) I relieved the defendants on motion after judgment, (no objection being made to the form of the application,) on the terms of making full compensation and paying all the costs, and on appeal the decision was sustained by the General Term, so that the question must be considered as settled as respects this court.

The difficulty in the way of granting this relief now in the form of a judgment is, that the defendant does not waive his defence to the action on the legal right, but relies upon the tender and refusal as constituting in itself a sufficient ground for the court to decree equitable relief. Had the defendant, in addition to proving the tender and refusal, offered to bring the money into court, or had he made a distinct motion to pay what the court should consider to be just, before judgment, waiving any defence to the action, I am clear that the relief could have been granted. The question is certainly not free from difficulty and doubt, but under

our present view of it, the defendant cannot be prejudiced as to the relief by the mere fact of judgment passing for the plaintiff; we think this a proper disposition to be made of the case, reserving to the defendant his rights to apply after judgment.

It may be proper to advert to the motion made by the defendant on the trial for leave to amend the answer, by setting up the offer to pay the taxes in arrear, etc., and by inserting a prayer for equitable relief, or to file a supplemental answer for the like purposes. The motion was denied, and the defendant excepted.

So far as the refusal to allow the amendment is concerned, that was clearly in the discretion of the Judge, and is not a subject of exception. (6 Barb. R. 308.)

Was the Judge bound to have suspended the trial, and allow the defendant to set up the new matter in a supplemental answer?

The facts arose after the commencement of the June Term, at which the cause was tried.

A plea of *puis darrein* tendered at the trial, and properly verified, was, under the old practice, a matter of right, if a term had not intervened, whether the plea was good or bad, as a defence, (3 Caine's R. 172,) and if this motion was to be determined by the rules which formerly governed such a plea, the Judge would probably have been bound to have allowed it.

This court, in the case of *Hoyt v. Sheldon*, has recently decided that section 177 of the Code has established one uniform mode of applying to the court for leave to file a supplemental proceeding, to wit, by motion, and this is properly made on motion or on an order to show cause.

We think the Judge properly refused to allow the motion made at the trial.

Judgment must be for the plaintiffs, with liberty to the defendant to apply to the court for such relief against it as he may be entitled to, and without prejudice to his right to bring an action for such relief, if he deem the latter the proper course.

JAMES MCWILLIAMS v. JOHN M. MASON

The question was, whether a party could hold a surety, bound by an obligation he had entered into, the terms of which had been changed between the principal and creditor, without the surety's assent?

Held, that the question of benefit or prejudice arising to the surety was not the test of his responsibility. That if the terms upon which he engaged are not fully observed; if any practice or deceit has taken place which makes the contract between the debtor and creditor different from that assented to; or if, without deceit, a material change has been made, and this is not communicated, the surety is discharged.

Held, that where a party agrees to become bound for \$1500, expected to be advanced in cash to the principal for business purposes, and but \$1000 was actually so advanced, and the chief portion of the residue was adjusted by discharging an old debt to the party making the advance, and no notice was given of this to the surety, he was exempt from liability.

(Before OAKLEY, CH. J., HOFFMAN and SLOSSON, J.J.)

October 22, 1856; January, 1857.

APPEAL from a judgment on the report of a referee in favor of the plaintiff. All the material facts are stated in the opinion of the court.

J. W. Edmonds, for appellant.

E. W. Stoughton, for respondent.

BY THE COURT. HOFFMAN, J.—Thomas Carlisle applied to one R. M. Townsend for an advance, by way of loan, of \$1500, offering to give him his bond, guaranteed by the defendant. He was then indebted to Townsend in an unpaid note of \$197.

Mason consented to guarantee his bond for the repayment of such intended loan of \$1500. Carlisle informed Townsend of such consent, and the latter agreed to make the loan.

A bond, dated the 28th of March, 1848, was then executed by Carlisle to Townsend, in the usual form, on which Mason indorsed his guaranty, dated the same day, as follows:—

“In consideration of the sum of one dollar to me in hand paid,

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by R. M. Townsend, the obligee named in the within bond, the receipt whereof, etc., I, John M. Mason, do hereby guaranty and promise to the said R. M. Townsend, the payment to him, his heirs, executors, administrators and assigns, of the principal sum of \$1500, mentioned in the condition of the said bond, or obligation, and the interest thereon, at the times and in the manner mentioned in the condition and agreement, written under said bond or obligation."

"In witness, etc."

(Signed)

"J. M. MASON."

With this bond Carlisle effected with Townsend a negotiation in the following manner:—The note of the former, with interest, (being the sum of \$229.87,) then past due, was given up and treated as so much advanced. A bond and mortgage of one Little and wife, for the sum of \$1200, with interest due of \$93.55, was assigned by Townsend to Carlisle, for the residue of the loan. Thus the face of the debit to Carlisle, so made up, was \$1523.49. Carlisle signed a statement to the effect that such account was correct, he being credited with the bond of March 28, 1848, for \$1500, leaving him debtor \$23.49. The old note of Carlisle was worthless.

But Carlisle, at the period of this transaction, had, with Townsend's privity, negotiated with one Strong to cash the Little bond and mortgage. The sum of \$1075 only was advanced upon it by Strong, and Townsend made the assignment of the bond and mortgage directly to Strong.

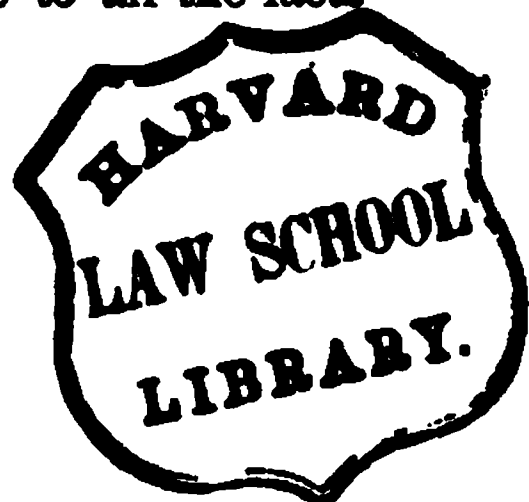
The questions to be considered may be thus presented:

Can a surety who has guaranteed the payment of \$1500 to be advanced to his principal be held responsible for \$1000, being the whole amount actually advanced?

Again, can a surety who has guaranteed an advance to a given amount, to be made in cash, be held liable when part of that amount was made in cash, and the residue, (about one-fifth of the whole amount,) was agreed, between the principal and creditor, to be applied in extinction of an old debt of the principal, who also was insolvent?

May the surety, in this last case, be held liable for the actual cash advance, if not for the whole sum?

But it is first to be observed, that the evidence to all the facts



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which give rise to the defendant's defence in this case is by parol. The instrument of guarantee is the written indorsement on the bond, making himself responsible for the payment of the \$1500, according to its condition. But the consideration of the bond, like the contents of a receipt, is open to explanation by parol testimony. The principal obligor could show how he received the amount, or that he received less. The surety has the same right, and thus the facts are made out, by legal evidence, to raise the questions above indicated.

The questions are of interest, and I have examined a number of the leading authorities which appear to bear upon them.

In *Phillips v. Astling*, (2 Taunton, 206,) the contract was to guarantee a bill of exchange for a certain sum, viz., the price of goods supplied by the plaintiff. A bill was accepted for a larger sum, and the surety was held not liable for even the amount he had agreed to secure.

In *Evans v. Whayle*, (5 Bingham, 485,) the defendant guaranteed the plaintiff to the extent of £50, for any gold he might supply Evan Evans, for the purpose of working in his business, which was that of a goldsmith. The plaintiff discounted bills for Evans, and paid him, partly in money and partly in gold. The latter was used in the business. It was a purchase of bills, not a sale of gold in the way of trade. The surety was held not responsible.

Whitcher v. Hall, (5 Barn & Creswell, 269,) was a strong case of a comparatively immaterial difference between the contract guaranteed, and that substituted between the creditor and debtor. "The question is not as to the amount of the difference, but whether the contract performed by the plaintiff is the original contract to which the defendant was a party."

See, also, *Baron v. Chesney* (1 Starkie, 192).

Isllyn v. Hartell, (8 Taunton, 208,) is a leading authority upon one point in this cause. The guarantee was: "I will be answerable for the extent of £5000, for the use of the house of Spitta, Molling & Co." The declaration had treated this as prospective, and the court inclined to think it was so. The plaintiffs, upon receiving the guarantee, cancelled a previous indebtedness by surrendering the vouchers and taking a new note. It was held that the surety was not liable.

So in *Boulter v. Cox*, (4 Beavan's Rep. 380,) John Cox, as a surety of Richard Cox, executed two notes "for value received by a draft at three months' date." The meaning was, that the parties to whom the notes were given, were to advance the money on a three months' credit. The goods were sold payable on demand. These parties made the advances directly, so as to give them a right to demand immediate payment. The right of the creditor was thus materially different from that which was intended by the surety, and it was not a sufficient answer that no demand was made of the surety within the three months for which credit was given.

And in *Bonar v. McDonald*, (1 L. and Eq. Rep. 1, in the House of Lords,) Lord Brougham states the rule thus, as given in a note of Lord Cottenham, and expressed his concurrence in it: "Any variation in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent, which may prejudice him, or which may amount to a substitution of a new agreement for a former agreement, and though the original agreement may, notwithstanding such variation, be substantially performed, will discharge the surety; and, as to Scotland, in Bell's Principles, 71, the rule is laid down that the cautioner is freed by any essential change consented to by the creditor in the principal obligation or transaction."

The late case of *Owen v. Homan*, (3 McNaughten and Gordon, 378,) is one of much importance upon the general question, and some of the propositions are pertinent to the present question.

"The cases," says Lord Truro, "which are reported, have generally arisen out of transactions in which there has been a personal communication between the creditor and the surety; and the clear law deducible from these decisions is, that the creditor must make a full, fair, and honest communication of every circumstance calculated to influence the decision of the surety, in entering into the required obligation."

He then adverts to the question, how the case would stand when the creditor leaves the debtor to communicate to the surety, and declines, or, at all events, abstains, from communication with the surety? He refers to *Pidcock v. Bishop*, (3 Barn. and Cres. 605,) and a dictum of Ch. J. Tindal, in *Hone v. Caupten*, (5 Bing.

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N. C. 142.) The motion before him (for a receiver) did not call for a decision of the question at that time.

In *Pidcock v. Bishop* the facts were these: The defendant signed the following guarantee: "At the request of Mr. Thomas Tichell I beg to inform you that I will guarantee you in the payment of £200 value, to be delivered to him in pig iron." This was dated 16th December, 1822. The plaintiffs supplied pig iron to the amount of £82 10s., and, upon default of payment, sued upon the guaranty. The defendant proved that Tichell agreed with the plaintiffs, that if they would let him have the iron at the market price, he would pay John Pidcock (manager of the plaintiff's business at the iron works, and one of the associates) ten shillings for each ton, to be applied to an old debt from Tichell to him. On these terms, and a guarantee to be given, the bargain was made. Tichell then procured from the defendant the instrument sued upon, but did not communicate the arrangement as to the ten shillings.

Abbott, Ch. J., said:—"The effect of the bargain would be, to compel the vendor to appropriate to the payment of the old debt a portion of those funds which the surety might reasonably suppose would go towards paying the debt for which he became responsible."

And Littledale observed:—"The surety might fairly suppose that the vendee would be able to pay the market price of the iron out of its produce when manufactured, and he gave the guarantee under that supposition. If he had known the bargain, he would have known that the vendee would have so much less to appropriate in payment for the iron, and, consequently, that his risk would be thereby increased." A nonsuit was entered.

There is a series of cases in the courts of our own country which impose a rule of equal strictness upon the creditor in his relations with the surety. And when there is a variance of a material nature, the question is not permitted to influence the decision whether the surety is, in fact, injured or not. (*Miller v. Stewart*, 9 Wheaton, 680; *United States v. Tillotson*, Paine's C. C. Rep. 305; *Nixon v. Palmer*, 4 Selden, 398.)

It is, then, manifest that the question of benefit or prejudice directly arising to the surety is not now the test of his responsibility. If the terms he engaged upon are not fully observed, if

any deceit has been practised or connived at, which makes the contract between the debtor and creditor different from the one he prescribed or assented to; or if, without deceit, a material change is made, and the creditor has not communicated it, the surety will be discharged. Now, in the present case, the difficulty has occurred to us, that the contract of the surety, as well as the terms of the contract, as performed, are proven by parol. In most of the cases, the conditions of the surety's engagement are defined in the instrument. The written undertaking is simply to pay according to the condition of the bond if the obligor did not. The material element of the defendant's contract was, that a loan of \$1500 was actually to be made—a clear new advance in cash. That is proven by parol.

But it may be questioned whether such evidence be at variance with the written document. If the consideration of the bond be fully open, it may well result that the consideration of the surety's engagement is also open to similar testimony. But chiefly we consider, that here was what is equivalent to a deception and legal fraud upon the surety. Townsend knew that he intended to be bound for a cash advance, and Townsend changes that into the extinction of an old debt due to himself and a partial cash advance. The difference is, that Carlisle actually received but \$1052 for the \$1500 which the defendant expected, and guaranteed upon such expectation. Townsend does not communicate this to the defendant. Our conclusion is, that the evidence is admissible, and, as a necessary consequence, that a case is made out, within the authorities we have cited, for the exemption of the defendant.

Another point was raised by the pleadings, and referred, of course, to the referee; that is, that the transaction was tainted with usury, by reason of the transfer of the Little bond and mortgage, upon which \$1075 only was received, it being, on its face, of the value of \$1293.55.

The referee does not, in terms, pass upon the question of usury; but, as he finds the sum of \$1075 due, with interest, he, of course, finds that there was no usury.

That question is one upon which serious doubts may be entertained. But it must be observed that it is by no means clear that the bond and mortgage were not, in fact, worth, in Townsend's hands, the whole of the apparent amount due upon them. If the

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case, then, was nakedly, that Carlisle, to meet his necessities, sold at a large discount, securities really worth their face, it would be difficult to make out a case of usury. At any rate, we are not prepared to place our judgment upon this point. As the conclusion upon the former point disposes of the case, we forbear considering this question further.

The judgment entered upon the report of the referee, must be reversed, and judgment dismissing the complaint be rendered, with costs.

ERNEST FIEDLER v. THE NEW YORK INSURANCE COMPANY.
THE SAME v. THE SAME.

The cost of repairing a vessel disabled by the perils of the sea must exceed a moiety of her value in the policy, making the usual deduction of one-third new for old, to warrant a recovery for a constructive total loss.

In the first case, the vessel was valued at \$16,000 in the policy, and the jury found that the whole cost of repairs would have been \$12,000, thus, (making the usual deduction,) leaving \$8,000 as the actual cost for which alone the insurers could be liable. *Held*, therefore, that it was only a partial loss that the plaintiffs were entitled to recover.

In an estimate of the cost of repairs, in order to determine whether there was a constructive total loss justifying an abandonment, surveyors fees and general average losses are not to be included.

Held, in the second case, in which the policy was upon freight, that as there was not a constructive total loss of the vessel, and the cargo had been delivered, there had been no loss of freight for which the defendants could be liable.

Even where there has been a constructive total loss of the vessel, yet, if before an abandonment for that cause, the cargo has arrived and been delivered at its port of destination, no loss of freight is recoverable. The freight, in such a case, belongs to the assured, and the loss is his if he fail to collect it.

(Before HOFFMAN, SLOSSON and WOODRUFF, J.J.)

Heard and decided, January Term, 1857.

MOTION on the part of the plaintiff in each of these causes for judgment upon a verdict in his favor, which, by order of the Judge who tried the causes, was taken subject to the opinion of the court at General Term, and judgment in the mean time suspended. The verdict in the first case was for \$13,000, in the second, for \$3,000; the amount of each verdict was agreed on by the parties, and made subject to future adjustment. By the like

agreement, there was but one case, upon which both causes were heard, for although the questions of law were different, the evidence and the facts in both were the same.

In the first action, the plaintiff claimed to recover a total loss, under a policy of insurance made by the defendants upon the bark *Helen, M. Fiedler*. The voyage, described in the policy, was at and from San Francisco, to a place or places in the Columbia River, and at and from thence back to San Francisco. The sum insured was \$8,000, and the vessel was valued in the policy at \$16,000.

The second action was on a policy of insurance upon freight made by the defendant upon the same vessel and voyage; the sum insured was \$2,000, and a total loss was demanded. The causes were tried before Duer, J., and a jury, in April, 1854, and upon the trial there was a great conflict of evidence as to the probable cost of the full repairs of the vessel at San Francisco, and the possibility of making them. The Judge instructed the jury, in the action upon the vessel policy, to find a general verdict for the plaintiff, who, at any rate, was entitled to recover a partial loss, and he required the jury to answer specially the following questions:—

1. What would have been the whole cost of repairing the vessel at San Francisco, so as to render her entirely seaworthy for voyages on the west coast of America?

2. Could the vessel have been fully repaired at San Francisco?

3. What would have been the whole cost of full repairs at San Francisco, upon the supposition that they could there have been made?

The answer of the jury to the first question was, \$5220; to the second, yes; to the third, \$12,000. Exceptions were taken by the counsel of both parties to different portions in the charge of the Judge, and also to some of his rulings upon the trial; but it is unnecessary to state them, as they were all rendered unimportant by the grounds upon which the court, at General Term, placed its decision.

The following are the material and uncontradicted facts proved upon the trial, upon which the questions of law arose that were determined by the court.

The vessel on her return voyage to San Francisco, with a full

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cargo of lumber on board, and while still in Columbia River, was seriously damaged by the perils insured against, and with a view to her preservation threw overboard a small part of her cargo. She returned, however, to San Francisco without further loss, and then delivered her cargo to a mercantile firm, who were its consignees and part owners. A regular survey was then had upon the vessel, for the purpose of ascertaining the nature and extent of her injuries, and the surveyors, in their report, calculated the cost of repairs, exclusive of copper, at the gross sum of \$12,000, but stated, at the same time, that from the want of the necessary means and materials, full repairs could not be made at San Francisco, and upon that ground advised the sale of the vessel. She was accordingly sold at public auction for the sum of \$3450. The sale was on the 2d of April, 1850, and the plaintiff abandoned to the defendants on the 29th of May following.

F. B. Cutting, for the plaintiff, contended that there was sufficient proof of a constructive total loss to entitle the plaintiff to a judgment; that surveyors' fees, tonnage, commissions, and that share of the general average resulting from the disasters in Columbia River, which was chargeable to the vessel, should be added to the \$12,000 found by the jury, as the cost of full repairs, and that with this, the cost of full repairs, after making the usual deduction, would be found to exceed a moiety of the sum at which the vessel was valued in the policy. (2 Arnould Ins. 1106; *Pezant v. The National Ins. Co.*, 15 Wend., 453). The counsel also contended that the estimate made by the surveyors, and their recommendations, fully justified the master in selling the vessel for the benefit of whom it might concern, and that the sale thus made, created of itself a total loss, for which the defendants were liable. (*The Fortitude*, 3 Sumn. 267). The counsel was proceeding to argue that the verdict of the jury upon the special questions submitted to them, was against evidence, but the court refused to entertain the question.

The right of the plaintiff to recover a total loss of freight, was placed by the counsel on the grounds that there was a total loss of the vessel by the disasters in the Columbia River, that the abandonment related to that period, and from that time vested in

the defendants, so as to entitle them to her subsequent earnings, which were thus lost to the plaintiffs.

R. Emmett, for the defendants, insisted that as the rule is settled, that to constitute a technical total loss of a vessel, the cost of her repairs, deducting one-third new for old, must exceed a moiety of the sum at which she is valued in the policy; the plaintiff was concluded by the answers of the jury to the questions submitted to them, and upon the facts so found, it was certain that no technical total loss had occurred. There were also other grounds, upon which the counsel contended that a total loss was not recoverable; the vessel on her arrival at San Francisco, her port of destination, was capable of being repaired, and after her arrival in that state, there could be no abandonment even had it been proved that the cost of her repairs would have exceeded a moiety of her value. (Marshall on Insurance, 2 ed. 503; 2 Phillips, 3 ed. 293; 15 Wend. 453.)

Again, the vessel was not entitled to full repairs, but only to such as would have rendered her competent to perform the voyages on which she was to be employed, that is, voyages on the west coast of America, and the evidence on the trial proved that she could have been rendered navigable for such voyages for an inconsiderable sum.

As to the sale of the vessel the counsel argued that even if made in good faith it was wholly unwarranted by the existing circumstances, either upon the ground of necessity or as an exercise of sound discretion. (He cited *Robinson v. Commonwealth Ins. Co.*, 3 Sumn. 226; *Hall v. Franklin Ins. Co.*, 9 Rider, 466; *Hunter v. Parker*, 7 Mees. & Wels. 342; *Ruckman v. Merchants' Louisville Ins. Co.*, 5 Duer, 342, and other cases.) As to the freight the counsel argued that there was in reality no loss whatever, and that the abandonment as for a total loss was a nullity. The vessel had arrived at San Francisco, and had there delivered her cargo to the consignees, the freight was then earned, and when earned belonged to the plaintiff. By such arrival and delivery the rights of the parties were fixed, and could not be changed by a subsequent abandonment of the vessel, even had a technical total loss been proved. (*McCarthy v. Abel*, 5 East. 388; *Marine Ins. Co. v. Turner*, 20 Eng. L. & Eq. R. 24.)

In the actions upon the vessel's policy, the views and decisions of the court were expressed in the following opinion.

BY THE COURT. HOFFMAN, J.—The chief difficulty of the court has arisen from the state of the record.

The action is brought upon a policy of insurance on a vessel, claiming to recover for a technical total loss. The value of the ship in the policy was \$16,000.

The Judge, at the trial, was requested by the plaintiff to charge certain propositions, which he declined in the form presented. The Judge embodied his actual charge in nine propositions. Each party took exceptions. He also requested the jury to answer, in writing, three particular questions, which they did; and they found a general verdict for the plaintiff.

All the requests—all the propositions in the charge of the Judge, except the ninth, and all the exceptions bear upon the question of a total loss. And if there had been no special finding sought from the jury, and assuming that the law of the Judge was right throughout, the general verdict would have entitled the plaintiff to judgment for a total loss.

Again, but for the ninth proposition before noticed, we should have been compelled to compare the general verdict with the special finding; and the Code (section 262) provides that where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

If, then, the general verdict alone would have warranted judgment for a total loss, and the special finding would not, the plaintiff could not recover for such loss. Still it might have been the duty of the court to reconcile the two if possible; and if the testimony disclosed facts which would reconcile them, but which were not involved in the verdict, a new trial might have been had to establish them.

But the ninth proposition in the charge of the Judge, before alluded to, supersedes all these considerations.

In that proposition the jury were told, that if the plaintiff was not entitled to recover for a total loss, he would still be entitled to an average loss, including a general average, which could be adjusted under the direction of the court. The Judge then sub-

mitted the whole case to them, requesting them to find the particular facts.

The jury were then instructed that they must necessarily find for the plaintiff, as upon either theory as to the nature of the loss, he must recover; and the plaintiffs contend, and the defendants admit, this to have been the case. The general verdict then determines nothing, and imports nothing, upon those propositions which would involve the question, whether the loss would be a total or a partial one? It is nakedly, that the plaintiff is entitled to recover; a total loss, if something besides the verdict gives it to him, a partial loss otherwise.

And thus the case depends upon the answers to the special questions; in truth, upon that to the third question.

In reply to such third question, the jury have said, that the whole cost of full repairs at San Francisco would have been \$12,000. Deducting one-third, new for old, we have then \$8,000, which will not make up a total loss. The rule is not to be questioned, that there must be an excess of a moiety. The value in the policy was \$16,000. Then the counsel for the plaintiff presents this proposition, to establish a total loss. Surveyor's fees were paid, amounting to \$144; and this is proven in the case. Now, either the jury have included such fees in the estimate of \$12,000 as necessary and sufficient to make complete repairs, or they have not. Surveyor's fees are to go into the estimate, but not to be subject to the abatement of one-third. Hence, if included by the jury, the deduction should not be made, and then the cost will be \$8048 after the deduction. If not included, then the fees \$144 are to be added to \$8000.

We need not notice the point, that we are thus compelled to find as a fact, that the surveyor's fees were paid; and that the Court of Appeals forbids us, at General Term, to deduce facts from evidence, and give judgment upon them. There is an answer more decisive.

We consider it settled, that in making an estimate of the extent of the injury which warrants an abandonment, surveyor's fees are not to be included.

In deciding what may be taken into the account, in estimating a constructive total loss, the Supreme Court of Massachusetts has settled a principle which will exclude such fees entirely. In *Hall*

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v. *The Ocean Insurance Co.*, (21 Pick., 472,) which was an action to recover for a total loss, the Judge at the trial laid down the rule, that the expenses incurred for the purpose of ascertaining the extent of the loss, should not be comprised in the charges which were to determine whether the losses amounted to fifty per cent. of the value. In this the court fully sustained him.

The court also declared the rule, that the items which should properly be carried to the account of general average, should not be included.

"The court are of opinion that the particular average loss is to be made up in the usual manner, deducting one-third new for old, independently of the general average, and of the expenses of ascertaining and proving the loss, and if, upon such a calculation, the sum exceeds one-half of the amount insured, then, and not otherwise, the insured has a right to abandon for a total loss."

In *Orrock v. The Commonwealth Insurance Company*, the Supreme Court sustained the ruling of the Judge, that in making up fifty per cent., which authorizes an abandonment, the vessel's proportion of items of general average should not be included. The evidence of Mr. Tyler in this case showed the custom of Boston. The expense of a survey while the cargo was on board, would be charged as general average, and the expense of a second survey of the vessel, after the cargo was out, would be partial loss; that the cost of the carpenter's work and labor, and the expenses necessary in order to make surveys, would follow the surveys respectively, and be general average or partial loss, as the principal to which they were incident was the one or the other.

The adjustment of Mr. Phillips, the eminent writer on Insurance, in *Potter v. The Ocean Insurance Company*, (3 Sumner, 27,) was upon a similar principle. He had charged one-half of surveyor's fees to general average, and one-half to particular average against the ship. He then deducted one-third from these sums. Justice Story held, that the deduction ought not to be made from such items.

By the 369th article of the Code of Commerce of France, an abandonment may be made when the loss or average is not less than three-quarters of the value of the property insured. The writers distinguish between losses real and legal. The case of a capture is of the last character; that of destruction to the amount

of three-quarters, of the former. The latter is the presumption of an entire loss. (Boulay-Paty, vol. 4, 222.)

In making the estimate of damage to such an amount, nothing is to be considered but what has fallen corporally, and by the peril of the sea, upon the thing insured. No expenses which the assured is obliged to make, and which, indeed, increase the price of the goods to him, are considered. (Boulay-Paty, 4, p. 251.)

The rule as to a vessel is, to take her value as stated in the policy and her market value at the place of the accident, and ascertain whether the latter is one-fourth of the former. The comparison is not with the amount judged necessary to repair her. (Boulay-Paty, 4, p. 251.)

It is not eligible and just, that when a partial loss to a vessel alone, or a loss to which she as well as cargo and freight are to contribute, is adjusted, surveyors' fees should be charged to underwriters. They have resulted from the peril and the damage. The case is different when the question to be solved is, what would it cost to replace the vessel in the same situation she was before the injury, deducting as usual? The result of that inquiry is the test amount, without the expenses of ascertaining it. The moiety rule is itself an arbitrary one, and not a favorite of the law. The admission of items to make up the sum should be rigidly limited to what the rule exacts.

Although the damage to the vessel at the Columbia River may have formed a ground of general average, yet it was included in the estimate at San Francisco. That was the aggregate of injury sustained by her as she then existed. The mere fact of a previous damage constituting a claim for general average, could not add to an estimate which was to include the total injury.

The liability of the ship to contribute any thing in general average to the owners of the lumber sacrificed in the river, could not upon any principle be added.

The result is, that there was not a total loss. The finding is conclusive.

It has been intimated that neither party desires a new trial, being content to take the decision of the court upon the question as to a total or partial loss, upon the record as it stands. If so, we need not enter upon the consideration of many important questions upon the ruling of the Judge, the exceptions, or the

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grave objections to the finding upon the evidence, supposing the record enables us to examine them. Unless, therefore, we have misunderstood the counsel, the judgment will be for a partial loss. The counsel, it is supposed, would agree upon the principles of adjusting this. If not, they can be settled by one of the Justices before whom the appeal has been heard.*

Upon the freight policy, the following was the judgment of the court.

BY THE COURT. HOFFMAN J.—This is a case submitted upon points, and it is admitted that the case made in the cause of Fiedler against the same defendants, in the action upon the policy on the vessel, with all the answers of the jury, shall be treated as found in this case; the amount of the verdict being, however, \$3000, subject to adjustment.

The action is upon a freight policy on the barque Helen M. Fiedler, for \$2000. The claim is for \$2000. The claim is for a total loss.

The vessel proceeded from San Francisco to the Columbia River, and there took in a cargo of lumber. She met with various accidents and perils on her return, and at the mouth of the river she was driven ashore, and portions of the lumber were placed alongside in rafts, and some quantity swept away by the current and drift wood. The quantity or value is not stated.

The vessel carried the great bulk of her lumber to San Francisco, and delivered it there to order, or into the hands of the consignees or owners. These were the Messrs. Ward and Company, who were also the agents of the owners of the vessel, Burgoyne and Company, Russel the mate, and the master. Burgoyne and Company, paid their share of the price of the lumber, and the vessel was consigned to Ward & Co. After that, the proceedings and survey, and sale of the ship took place, and the vessel was abandoned to the insurers as for a constructive total loss, as stated in the other cause.

* Since this opinion was prepared and the judgment delivered, I have met with the case of *Greely v. The Fremont Ins. Co.* (9 Cushing Rep., 415). It was there expressly held that general average losses are not to be added to the cost of repairs in order to determine the question of an excess of half the value upon a constructive total loss.

We understand that counsel agree to our finding these undisputed facts from the testimony in the case, and these are all that are material to determine the claim for a total loss of the freight.

There is no ground for the claim of the plaintiff upon an actual total loss of freight from the failure of the vessel to earn it through any of the perils insured against. It is not placed upon this basis.

It may appear somewhat singular, that the claim should be asserted at all, when the cargo, (what was actually lost in the river being wholly undetermined,) was carried to the port of destination, was actually delivered, and the freight was received, or was legally payable, and when the agents of the owners of the vessel received, or were entitled to demand it.

The reasoning to sustain the claim we understand to be this—

The abandonment to the underwriters on the vessel, being for a total loss, and retrospective, carried a title to the ship as she was at Columbia River. The freight collected at San Francisco, passed to the underwriters of the ship, and when collected by Ward & Co., belonged to such underwriters. Such freight was, therefore, lost to the plaintiffs by the perils of the sea, as much as if the ship had foundered at the Columbia River.

It might be sufficient to say, that in this case, in the action against the underwriters on the ship, we have decided that there was not a constructive total loss.

But let it be assumed, in the present case, that there was such a loss of the vessel, we apprehend that the plaintiff must still fail in his demand.

The important case of *The Scottish Marine Ins. Co. v. Turner*, (20 L. & Eq. 24,) in the House of Lords, and cases cited, are the only authorities necessary to be referred to. That case embraces the whole of the law which is applicable in the present instance. A ship was insured for £7500, by the appellants for £1500, and by the Greenock Insurance Co. for the balance. The present appellants were insurers on the freight for £1500.

The ship was much damaged in the early part of the voyage, by coming in contact with an iceberg, but reached her port of discharge, where she met with much further damage. After this, the owners abandoned her for a total loss, and in an action, it was established that she was properly abandoned. The cargo had, however, been delivered, and the freight earned and paid by the

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consignees to the owners. It was decided, (in a previous action,) that the freight belonged to the insurers of the ship, the owners having accounted to such insurers, the abandonees, for the freight, brought the present action on the freight-policy of the defendants below. All the Judges in the Scottish Courts, except Lord Moncrief, sustained the claim. The case went to the House of Lords on appeal.

The decision was there reversed.

The Judges in the House of Lords take this distinction :—If the abandonment of the ship is made during the voyage, and before the freight is earned by delivery of the cargo, the action may be sustained; but it cannot be when there is no abandonment until the ship had arrived in port, and when the owners were in a condition to insist on the payment of freight, and the freight had been paid to them. They adopt the language of Baron Alderson, that “there is no instance to be found in which an action for a total loss of freight has been held to be maintainable where the freight has been actually earned.”

Lord Truro, after stating, that, “in his opinion, the decision that there had been a total loss of the ship was in advance of previous decisions,” stated the import of the contract of insurers on freight. “The underwriters on freight” he says “bind themselves to indemnify the assured against any loss of freight occasioned by the ship being prevented performing the voyage insured by any of the perils mentioned in the policy, and thereby the freight insured being earned. They do not engage that the assured should be able to procure a loading, or that they should be entitled to retain the freight, as between themselves and any other persons, after it shall have been earned.

“The expression, ‘the loss of freight,’ has two meanings; freight may be lost in the sense, that by reason of the perils insured against, the ship has been prevented earning freight; or ‘loss of freight,’ may be used in the sense that it may be lost to the owners after it has been earned, by some circumstances unconnected with the contract between the underwriters on the freight and the assured.

“For a loss of freight, in the first sense, the underwriters on the freight are liable; but for any loss of freight incurred by the owners after it has been earned, I conceive the underwriters are

not liable. I can extract no obligation whatever from the policy which should subject them to such a loss.

“The underwriters on the freight have engaged that the ship should not be prevented, by the perils of the sea, from enabling the owners to earn freight; nor was she so prevented, for, in spite of those perils, she arrived in port, and the owners obtained payment of the freight. The right of the underwriters to claim payment of that freight from the owners, arose, not from the perils of the sea, but from the election made by the owners, after the freight had been earned and paid, to treat the ship as wholly lost on or before the 11th of August, before she got into dock.”

The case in which it was decided that the freight was to be paid to the insurers, was *Stewart v. The Greenock Marine Insurance Co.* (2 House of Lords, and Cases, 159). The facts of the present case are nearly identical with that of *The Scottish Company v. Turner*. This vessel, indeed, met all the disaster and injury at the Columbia River; the vessel in that case met some in the Gulf of St. Lawrence, and more in harbor, but before getting moored. This difference is immaterial. In each case the lumber was delivered, and the freight earned. In each case the freight went into the hands of the ship-owners, or their agents. In each case the abandonment was subsequently made, after the freight had been earned, and was paid or payable. In the Scotch case, the underwriters on freight were among the underwriters on the ship. Here, as far as the case shows, these defendants were the only underwriters on ship and freight.

We find, again, that before the insured brought their action they were obliged to account to the insurers of the vessel for the freight. The Judges, in the court below, relied much upon this, holding that the owners of the vessel never received the freight above for their own use, but for the underwriters.

This argument was answered by Lord Truro: “In this case, at the time the owners received the freight, they so received it on their own account, for their own benefit, and, as the facts then stood, were entitled to retain it against all the world. The contract between the owners and the underwriters on the freight had been entirely performed, and the relation between them determined, and the assured were entitled, then, not only to retain the freight but to recover compensation for any damage to the ship.

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But they preferred to claim a total loss and abandon the ship. By virtue of that election, the freight, received for their own benefit, became an item of account between them and the underwriters on the ship."

We may also observe, that the rights of the parties under these separate policies ought to be determined upon the same principles as if they were made by different assurers.

In our judgment the claim for a total loss is untenable

The parties, it is stated, are prepared to admit, among themselves, any claim for a partial loss on the lumber swept away in the Columbia River.

CHARLES G. HART v. HENRY R. HUDSON and JOHN C. SMITH.

Where the collection of a promissory note is guaranteed, the person to whom it is delivered, if the note is unpaid at its maturity, is bound to proceed with prompt diligence to enforce its payment. This is a duty which he owes to the guarantor.

If he neglect or violate this duty, he takes upon himself the risk of the collection of the note, and discharges the guarantor.

He violates this duty if, after commencing a suit against the maker of the note, he discontinues it, and takes from him a new note, or other security for its amount, payable on a future day, without the consent or knowledge of the guarantor.

If, in such a case, by an agreement between the parties a portion of the original note, when collected, is to be paid over to the guarantor, the latter has an immediate right of action for the recovery of this balance, in the same manner as if it had been in fact collected.

A surety on a promissory note, whether as a guarantor or an indorser, is, in all cases, discharged where, without his consent or knowledge, a new note, payable on a future day, is taken from the maker.

Although the taking of such a note may operate, as between the parties, only, as a conditional satisfaction, yet, in all cases, it suspends until maturity the right of collecting the original note, and is, therefore, in all cases, an unwarranted extension of credit, discharging a surety.

Where the promise of a defendant is stated in the complaint as absolute, but is proved, upon the trial, to have been conditional; if it is also shown that, before the commencement of the action, the condition was fulfilled, the variance, under a reasonable construction of sections 169 and 171 of the Code, may be disregarded.

At any rate, when the evidence showing the variance has been received upon the trial, without objection, the referee ought to disregard it, leaving to the court,

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in the exercise of the discretion given by § 178 of the Code, to amend the complaint, by conforming its allegations to the proof.

Report of a referee, dismissing the complaint, set aside, and new trial granted.

(Before DUER and WOODRUFF, J.J.)

Heard, November, 1856; decided, January, 1857

APPEAL from a judgment entered upon the report of a referee, dismissing the complaint.

The pleadings in the case are the following:—

The complaint in this action of Charles G. Hart, plaintiff, against Horace R. Hudson and John C. Smith, defendants, being copartners under the style of Hudson & Smith at the city of New York, shows—

That on or about the third day of June, 1851, the plaintiff was the holder and owner of a certain promissory note in writing, bearing date September 9th, 1850, made by Bailey & Brothers, payable to Margaret A. Overacre one year from date, for the sum of two hundred dollars, with interest thereon from the date aforesaid.

That the plaintiff was on the same day indebted to the defendants for goods and wares, before that sold and delivered to the plaintiff by the defendants, in the sum of one hundred and fourteen dollars and thirty-one cents.

That in consideration of the premises, and of what is further hereinafter set forth, the plaintiff, on the said third day of June, 1851, at said city, sold and delivered to the defendants the said promissory note for the sum then due thereon, to wit, for the sum of two hundred and ten dollars and twenty-five cents, which sum, in consideration thereof, the defendants thereupon then and there undertook and promised to pay to the plaintiff as follows, to wit, first by discharging the plaintiff from the said claim which the defendants held against him for the said sum of one hundred and fourteen dollars and thirty-one cents; and secondly, by paying the balance to make said sum of two hundred and ten dollars and twenty-five cents, to wit, the sum of ninety-five dollars and ninety-four cents to the plaintiff within three days from the said third day of June, 1851.

That the defendants did, on the said third day of June, 1851, discharge the plaintiff from their said claim against him for the said sum of one hundred and fourteen dollars and thirty-one cents,

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but that they have not paid the plaintiff the said sum of ninety-five dollars and ninety-four cents, nor any part thereof; and—

That the plaintiff, on the sixth day of June, 1851, and often at other times before the commencement of this action, demanded of and from the defendants payment of the said last-mentioned sum, which the defendants refused, and still refuse.

Wherefore, the plaintiff demands judgment against the defendants for the sum of ninety-five dollars and ninety-four cents, with interest from the sixth day of June, 1851, besides the cost of this action.

And the said defendants, by Bell & Coe, their attorneys, answer the said complaint in this action, and admit that the plaintiff was the owner and holder of the note therein mentioned on the said 3d of June, 1851. They also admit that the said plaintiff was indebted to the defendants on the said last-mentioned day in the sum of one hundred and fourteen dollars for goods sold and delivered to him by these defendants in January, 1851.

And these defendants further answering, deny that in consideration of the said indebtedness of the plaintiff to these defendants, he sold and delivered the said promissory note for the sum due thereon, to wit, the sum of two hundred and ten dollars and twenty-five cents, or that in consideration thereof these defendants then and there undertook and promised to pay to the plaintiff the amount thereof by discharging the plaintiff from his indebtedness to them as therein set forth, the amount of his bill, and also to pay him a balance of ninety-five dollars and ninety-four cents within three days from the said 3d of June, 1851.

And these defendants deny, that they, on the said 3d of June, 1851, discharged the plaintiff from their claim against the plaintiff for the sum of one hundred and fourteen dollars and thirty-one cents, as therein alleged.

And they deny that they promised to pay him ninety-five dollars and ninety-four cents, or any other sum, on the 3d or 6th of June, 1851, or at any other time.

And these defendants, for further answer, say, that on the 3d of June, 1851, the plaintiff was justly indebted to these defendants, in the sum of one hundred and fourteen dollars and thirty-one cents, for goods previously sold and delivered to the said plaintiff on January 15, 1851, as per schedule hereto annexed, which

is a part of this their answer; and being so indebted, he assigned the said promissory note to these defendants, to be applied to the payment of said indebtedness, which said note is in the words and figures following, to wit:

“UTICA, *Sept.* 9, 1850.

“\$200. One year from date, for value received, we promise to pay Margaret A. Overacre, two hundred dollars, with use. Barclay & Brothers. Endorsed, pay to the order of C. G. Hart, Margaret A. Overacre.”

And these defendants aver, that at the time of assigning said note, as aforesaid, to these defendants, the plaintiff endorsed thereon the following guarantee: “For value received I guarantee the collection of the within note, to Messrs. Hudson & Smith. New York, June the 3d, 1851. C. G. Hart.”

And these defendants further show and aver, that when the said note became due and payable according to its tenor and date, to wit, on the 12th September, 1851, it was protested for non-payment, and of such non-payment, the said plaintiff was duly notified, and that the said note still remains in the hands of these defendants, uncollected, due and unpaid, which said note, these defendants produce here into court, ready to be delivered up, as the court may direct, upon the payment of their said bill, of one hundred and fourteen dollars and thirty-one cents, with interest from 3d June, 1851, which said sum remains undischarged, unpaid and due from the plaintiff to these defendants.

Wherefore, these defendants demand judgment against the plaintiff, for the sum of one hundred and fourteen dollars and thirty one cents, with interest thereon from the 3d of June, 1851, with costs.

The schedule referred to is not necessary to be stated.

The plaintiff, Charles G. Hart, to the answer of the defendants in this action, replies in the words following:

He alleges that the promissory note, of which a copy is set forth in said answer, is the same promissory note mentioned in his complaint in this action.

He denies that he assigned the said note to the defendants to be applied to the payment of any indebtedness to them, otherwise than he has alleged in his said complaint.

He denies that the said note was protested for non-payment, or that he was duly notified thereof.

He denies that the said note still remains in the hands of the defendants uncollected, due and unpaid, as alleged in said answer.

He alleges, according to his knowledge, information and belief that the defendants, on or about the 6th day of October, 1851, settled with and discharged Bailey & Brothers, the makers of the said note, and took in lieu and satisfaction thereof, from the said makers, their two promissory notes for the sum of one hundred and seven dollars and fifty cents each, payable to the order of the said defendants, the one at six months, and the other at eight months from the said 6th day of October, 1851, which said two notes are now held and owned by the defendants.

And he alleges, that at the time of such settlements between the defendants and the said makers of the said notes, he, the plaintiff, did not consent to, or know of the same.

The referee, by whom the cause was tried, after stating the evidence before him, made the following report:

To the Justices of the Superior Court:

I, Hamilton W. Robinson, the referee appointed in this cause to hear and determine the same, do report that I have been attended by the respective parties, and heard their proofs and allegations, and do find the following facts:

That on the 4th day of June, 1851, the plaintiff, being indebted to the defendant in the sum of \$114.31, for a bill of merchandise, transferred to them a note of Bailey & Brothers, dated September 9, 1850, for \$200, payable with interest to Margaret A. Overacre, one year after date. This note, although not negotiable, was endorsed with direction, signed by said Margaret A. Overacre, to "pay to the order of C. G. Hart," and also with her written guaranty to him, dated May 27, 1851, of the collection of the note as against Bailey & Brothers, and on its transfer by plaintiff to defendants, was also endorsed with the written guaranty of the plaintiffs, in these words, "For value received, I guarantee the collection of the within note to Hudson & Smith. New York, June 3, 1851. Signed C. G. Hart."

That on such transfer, the defendants executed to the plaintiff a bill and receipt in the words, "Mr. C. G. Hart, in ac. with

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Hudson & Smith, Dr., to bill of merchandise," for which a draft was accepted at 10 days' sight, payable at Broome County Bank.

	\$113	00
Expenses, . . .		15
	<hr/>	
	\$113	15

\$113¹⁴/₁₀₀.

Rec'd, New York, June 4th, 1851, of C. G. Hart, one hundred and thirteen ¹⁴/₁₀₀ dollars, in full for draft sent Stone & DeForest for collection, Hart to pay expenses to Stone & DeForest.

(Signed)

HUDSON & SMITH.

That the bill of merchandise mentioned in this receipt was the same first-mentioned, except an item of \$1.31 omitted.

That the defendants thereupon further agreed that they would write to Bailey & Brothers, to ascertain if they would discount said note, or if it could be discounted at the Bank of Utica, and that as soon as the defendants got the money on it, from any source, they would remit the plaintiff the surplus over and above paying the amount of his bill and interest.

That in the beginning of October, 1851, the defendants commenced a suit on the note against Bailey & Brothers, by issuing a summons to Oneida county, where they resided, and shortly afterwards arranged with Bailey & Brothers, by taking their two notes, to wit: one, dated October 6th, 1851, payable in 6 months, for \$107.50; the other, of the same date, payable in six months, for \$107.50, but holding the said \$200 note as collateral; but these two notes were not paid, and such note of two hundred dollars was produced by defendants on the hearing.

From these facts, as matter of law, I do find and determine, that the plaintiff has failed to establish by proof the cause of action alleged in his complaint, and that his complaint ought to be dismissed with costs. All of which is respectfully submitted.

April 2, 1853.

H. W. ROBINSON, Referee.

This report was duly excepted to, and the exceptions properly raised the questions upon which the cause was finally decided.

Hunt, for the appellant, contended that the report of the referee was, in some respects, against evidence, but that, even upon the

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facts as found by him, the complainant was entitled to judgment, and the dismissal of the complaint, therefore, a manifest error.

Bell, for the respondents, insisted that the finding of the referee, upon the questions of fact, was conclusive, and that the variance between the facts, as found by him, and the allegations in the complaint, was manifestly fatal, and the complaint, therefore, properly dismissed.

BY THE COURT. DUER, J.—This is a case of slight importance in respect to the sum in controversy; but it involves questions that have seemed to us worthy of our attentive consideration.

The first of the questions is, whether, upon the evidence before the referee, and the facts as found by him, the plaintiff was entitled to recover the sum demanded in the complaint? The second, whether, upon the supposition that he was so entitled, the variance between the proof and the complaint was such as to create a bar to his recovery in the present action? Each of these questions has been determined by the referee in favor of the defendants. In relation to the first, we have come to the conclusion, for the reasons that I shall proceed to state, that it must now be determined in favor of the plaintiff.

The sum for which judgment is demanded in the complaint is, the difference between the amount of the note of Bailey & Brothers, which was transferred to the defendants, and that of the debt which, at the time of the transfer, was owing to them from the plaintiff; and the question is, whether any breach of the agreement of the parties, as found by the referee, was proved, which entitled the plaintiff to recover the whole, or any part of the sum, he demanded?

The referee has found that, when the note of Bailey & Brothers, the collection of which was guaranteed by Mrs. Overacre and the plaintiff, was placed in the hands of the defendants, and accepted by them in payment of the debt then due to them from the plaintiff, they agreed, not absolutely to pay him the difference between the amount of their debt and that of the note, but to remit to him the surplus when collected or recovered by them, from any source; and for the purposes of this opinion, it may be admitted that this finding of the referee is justified by the evidence. What, then,

are the consequences? Plainly this, that the defendants, by accepting the note of Bailey & Brothers upon these terms, were bound, in justice to the plaintiff, to use all reasonable and legal diligence in its collection, and had no right, without his consent to extend the time of its payment, and still less to substitute any new security, payable on a future day, in place of that to which the guarantee of the plaintiff, and the prior guarantee of Mrs. Overacre, alone related. The defendants, however, instead of prosecuting to a judgment the suit which they had commenced against Bailey & Brothers, without the consent or knowledge of Mrs. Overacre or the plaintiff, divided the amount of the note they had received, with the interest accrued thereon, into two equal sums, and for each sum took from Bailey & Brothers a new note, payable, with interest, to them or order, the first note at six months, and the second at eight months from the date of the arrangement, and if this arrangement was, in judgment of law, and so far as the rights of the plaintiff are concerned, equivalent to a collection in money of the note which he had transferred, his right to maintain the action was fully established, and the conclusion of the referee, that the complaint ought to be dismissed, unless it was rendered necessary by the state of the pleadings, a manifest error.

We are clearly of opinion that the legal effect of the arrangement thus made with Bailey & Brothers, was precisely that which has been stated. The acceptance of the new notes, so far as the rights of the plaintiff are concerned, necessarily operated as a satisfaction of the old, and the defendants took upon themselves exclusively the risk of the ultimate payment of the notes they had received; they could not cast this risk, or any portion of it, upon Mrs. Overacre or the plaintiff. The effect of the arrangement was, to annul her guarantee as well as that of the plaintiff, as they had no longer any interest in the collection of the original note; in respect to them it was satisfied, and the plaintiff had, therefore, an immediate right to demand the payment of the sum which, in the event of its collection, the defendants had promised to remit. These positions we hold to be correct, both upon principle and upon the authorities.

That the defendants were bound to use all reasonable and legal diligence in the collection of the note transferred to them cannot be doubted. Their agreement to remit to the plaintiff a portion

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of the proceeds when collected, implied and imposed the duty of collection. To the extent of the plaintiff's interest they were his agents for the collection of the note, and, without his authority, could make no arrangement by which his rights as to the mode and time of its collection could be varied or affected. An agent for the collection of a debt can receive its payment only in money. He cannot release nor compound the debt, nor, by parity of reasoning, extend the time of its payment. (*Todd v. Reid*, 4 B. & Ald. 210; *Russell v. Bagley*, id. 395; Story on Agency, §§ 9, 161, 215, 413.) Hence, the defendants, in discontinuing the suit which they had commenced against the makers of the note, and in accepting their notes, payable on a future day, for the whole amount of the debt, acted at their own peril, and were guilty of a violation of duty which rendered them immediately liable to the plaintiff; just as a factor who sells upon credit the goods entrusted to his charge, and which he was authorized to sell only for money, is at once liable to his principal for their price or value. (1 Young & Jer. 389; 26 Wend. 192; 2 Will. 259; Story on Agency, § 109.)

In each case, the extension of credit without authority creates the liability. Certainly the plaintiff was not bound to wait for the balance of the original note to which he was entitled, and for which he had received no consideration, until the notes taken by the defendants from Bailey & Brothers should be paid at their maturity or otherwise. As these notes were taken without his authority or consent, he had the right to say that they were taken by the defendants at their own risk, and, therefore, to the extent of his interest in the original note, operated as an actual payment; or to express the proposition in other words, but with the same result, that the defendants, by their departure from their duty as his agents had become his immediate debtors for the sum which, on his behalf, they had undertaken to collect.

There are other views of the subject which lead necessarily to the same conclusion.

The collection of the original note of Bailey & Brothers was guaranteed to the plaintiff by the payee, Mrs. Overacre, and we are bound to presume that he relied upon her guaranty, in giving his own, and looked to her solvency as protecting him from loss, in the event of the insolvency of the makers. Hence, if the effect of the arrangement made by the defendants with the makers was

to release Mrs. Overacre from all liability for their default, the character and value of the note, as a security, were so essentially changed that it was no longer the note which the plaintiff had guaranteed, and he, as well as Mrs. Overacre, was freed from the risk of its future collection. By thus acting the defendants made the note their own sole property, and, taking upon themselves the whole risk of its collection, became at once liable to the plaintiff for his proportion of the debt it had been given to secure. They had included this sum in the notes which, without authority, they had taken, and were thus estopped from saying that it had not been collected.

That the effect of the arrangement made by the defendants with Bailey & Brothers, was to annul the guarantee of Mrs. Overacre and discharge her from all liability, cannot be doubted. A guarantee of the collection of a promissory note, or other evidence of a debt, does not mean that it shall be paid at its maturity, but that, by a prompt and diligent use of the means which the law affords, its payment may be enforced. Hence, if the debt so guaranteed is unpaid at its maturity, the creditor, if he wishes to retain the liability of the guarantor, must, without delay, commence proceedings for its recovery, and it is only when he can show that all the remedies which the law gave him against the debtor had been exhausted, that he is in a condition to demand payment of the debt from the guarantor. If he delay, without necessity, to commence the necessary proceedings, or, when an action has been commenced, to prosecute it to judgment and execution, the delay is imputed to him as "laches" and the guarantor is discharged. (*Taylor v. Bullen*, 6 Cow. 624; *Compton v. McNair*, 1 Wend. 455; *Eddy v. Stanton*, 21 Wend. 255; *Moakly v. Riggs*, 19 John. 69; *Loveland v. Shepherd*, 2 Hall, 159; *Burt v. Horner*, 5 Barb. 501.)

It is needless to dwell upon the application of these remarks to the case before us. It is obvious and decisive. According to the authorities to which we have referred, the abandonment by the defendants, without the consent of Mrs. Overacre, of the suit which they had brought against Bailey & Brothers, was alone sufficient to discharge her.

But we shall not stop here. The discharge of Mrs. Overacre, in the present case, does not rest merely upon the "laches" but

upon the positive acts of the defendants. Hence, the same consequence would have followed, had she guaranteed the payment and not merely the collection of the original note of Bailey & Brothers, or had the note been payable to her order and she had been duly fixed as an indorser.

It is familiar law, that a surety is discharged in all cases where it appears that, without his assent, the time of payment by an agreement, binding on the creditor, was extended to the debtor, and this even when it is certain that the extension of credit worked no injury whatever to the surety, (*Gahn v. Niemcewitz*, 11 Wend. 312, Nelson, J.; *Hoffman v. Hubbert*, 13 Wend.; *Hubby v. Bowen*, 10 John. 70; *Miller v. McCan*, 7 Paige, 455; *Bangs v. Strong*, 10 Paige, 11, S. C. affir.; 7 Hill, 250; *Boner v. Tiernan*, 3 Denio, 378; *Hubbell v. Carpenter*, 3 Barb. 520); and it is equally well settled that the taking of a bill or note from the debtor, payable on a future day, suspends, until then, the creditor's right of action for the original debt, and therefore operates, in all cases, as an extension of credit, by which not merely an ordinary surety, but an indorser, not assenting to the transaction, is discharged. (*Putnam v. Lewis*, 8 John. 389; *Myers v. Wells*, 5 Hill, 465; *Bank of Orleans v. Barry*, 1 Denio, 116; *Holmes v. De Camp*, 1 John. 34; *Burdick v. Green*, 15 John. 243; *Colemard v. Lamb*, id. 349; *Jackson v. Hacksley*, 16 John. 273; *Fellows v. Prentiss*, 3 Denio, 512; *McLean v. La Fayette Bank*, 3 McLean, 589.) In the case last cited, an evidence on a promissory note, which had been unused by all parties except himself, was held, by Mr. Justice McLean and his associate, to be discharged, upon the ground that as to him the renewal operated as a payment. (3 McLean, 620.) The case of *Myers v. Welles*, although differing in its circumstances, was decided by our Supreme Court in favor of an indorser, upon the same principle, namely, that by taking other notes from the makers for the same debt, credit had been extended to him, without the defendant's knowledge or assent, and in the case of *Fellows v. Prentiss*, it was held, by the court of errors, that the taking from the debtor his promissory note, payable only one day from its date, was an effectual discharge of his surety; and that parol evidence to show that the note was given merely as a memorandum of the sum due, and not as an extension of credit,

as contradicting the plain meaning and legal effect of the instrument, was inadmissible.

It is therefore apparent that the cases upon which the referee, in his written opinion, seems to have relied, have no application. The cases which he has cited, only prove what, as a general rule, is undoubtedly true, that the taking from the debtor his promissory note for an existing debt, is not, as between the parties an absolute satisfaction of the debt; but they do not prove that in such cases the creditor's right of action is not suspended until the note he has taken becomes due, nor consequently, that the note is not conclusive proof of an extension of credit, by which a surety or indorser is discharged. There is, in truth, no conflict in the decisions, and those to which I have referred, conclusively show that a negotiable note taken from a debtor, even as between the immediate parties, is a conditional satisfaction of the debt which forms its consideration, and that in respect to a surety, whether a guarantor or indorser, whose assent to the transaction is not proved, the satisfaction which it works and of which it is evidence, is absolute. It may be true that, had the defendants retained the possession of all the notes of Bailey & Bros., they might have had an election to sue the makers upon those last taken, or upon that which the plaintiff had transferred to them; but it is certain, that until the notes last taken were unpaid when due, the defendants had no right to sue at all, and equally so, that by this voluntary suspension of their right of action, the sureties on the note transferred to them, were wholly discharged; and it has already been shown, that this is all that was necessary to be proved to render the defendants liable in the present action.

Speaking for myself, I am convinced that, by the immediate effect of the arrangement made by the defendants with Bailey & Bros., the original note which the defendants then held, as an evidence of debt, was satisfied and extinguished. The notes taken by the defendants under this arrangement, were made payable to their own order, not to that of the payee in the original note; they were taken for the whole sum, including interest then due on the original note, and as they carried interest, they converted into principal, the interest they included. The notes thus taken, it seems to me, in their substance, as well as in their form, were a new contract, by which that then subsisting between the parties

was displaced and superseded; and I observe, with gratification, that in *Fellows v. Prentiss*, where the notes taken from the debtor were of a similar character, Chancellor Walworth expressed an opinion to the same effect.

It is quite unnecessary, however, nor do we mean to place our decision upon this ground, since it is enough to say, that the notes thus taken were an unauthorized extension of credit, by which, as between the defendants and the sureties, the original debt was extinguished.

The referee lays stress upon the fact that the original note was not surrendered or cancelled when the other notes were taken; but as stripped of its guarantee, the original note had lost its value, as it was no longer evidence of a subsisting debt, and no action could then be maintained upon it, either against the makers or guarantors; the fact that the defendants retained its possession is regarded by us as plainly immaterial. In *Fellows v. Prentiss*, and in *Myers v. Welles*, the creditor retained possession of the note from which the indorser was held to be discharged. Nor can we attach any importance to the fact that the defendants in their letter to the plaintiff, stating the terms of the arrangement they had made with Bailey & Bros., declared that they retained the note of Mrs. Overacre, doubtless meaning that which she had guaranteed, as a collateral security. It is manifest, that without her consent, they could not thus retain the note, and certainly, for such a purpose, the rights of the plaintiff cannot be affected by their intention to do what the law forbade them to do, namely, by a valid agreement give time to the principal debtors, and yet retain the liability of their surety.

Again, were it possible for us to hold that the notes taken by the defendants from Bailey & Bros., were taken merely as a collateral security, and had not the effect of suspending at all their right of action upon the original note, there is still another ground disclosed by the evidence upon which we should be compelled to say that the defendants had rendered themselves liable to the plaintiff to the extent of his demand.

It was proved, and proved without objection, that before the commencement of this action, the defendants had parted with, for value, one of the notes, which, under the arrangement with Bailey & Bros., they had received. From this time, therefore, their right

to maintain an action upon the original note, if not wholly gone, was certainly suspended, and from this time, therefore, there was certainly an extension of credit, by which Mrs. Overacre and the plaintiff were discharged. These additional facts, in the opinion of my brother Woodruff, would be conclusive, if standing alone, and in that opinion, I entirely agree; but we do not mean to intimate any doubt as to the sufficiency of the reasons before given, upon which it must be understood that we rest our judgment.

Lastly, I have said, that a negotiable note taken from a debtor for a precedent debt, as between the parties is a conditional payment. In the language of Chief-Justice Spencer, in one of the cases, it is a payment *sub modo*. Hence, although the creditor of the note is unpaid at its maturity, and may bring an action for the original debt, yet he cannot recover unless upon the trial he produces and cancels the note, or proves its loss, or destruction. (*Holmes v. O'Camp*, 1 John 24; *Pintard v. Inchington*, 10 John 104; *Burdick v. Green*, 15 John 247.) We cannot believe that the same facts which, as evidence of payment, would have discharged Bailey & Bros., had they been sued by the defendants on their original note, namely, that the notes which they had given for the same debt were outstanding and not cancelled, were just as conclusive to charge the defendants in the present action. If the original note was satisfied in respect to its makers, *a fortiori* was it satisfied in respect to the plaintiff?

The result is, that in our opinion, the referee drew a wrong conclusion from the facts which he states to have been proved. The true conclusion was, that the defendants, before the action was brought, in judgment of law, had collected the note of Bailey & Bros., which the plaintiff transferred to them, and the plaintiff was therefore entitled to demand and recover from them the surplus, with interest, which, in that event, they had agreed to remit to him.

We pass to the second question. It is insisted that the agreement of the defendants, as found by the referee, is not that set forth in the complaint, and that the referee was therefore justified in holding that the plaintiff had failed to establish, by proof, the cause of action alleged in this complaint; and was justified, upon this ground, in dismissing the complaint. Although this objection to a reversal of the judgment appealed from, has created

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some hesitation in our minds, we are satisfied upon reflection, that it cannot be allowed to prevail. We are satisfied that there was no such failure of proof as could justly be considered a bar to the plaintiff's recovery. It is true, that the agreement found by the referee varies from that set forth in the complaint, but it does not follow that the variance was such as to render a dismissal of the complaint necessary or proper. The promise of the defendants, as set forth in the complaint, was absolute, as found by the referee, conditional; but it must be remembered, that the condition was shown to have been fulfilled, and the liability of the defendants to be exactly the same as if the allegation in the complaint had been literally proved. It may, therefore, well be doubted, whether this variance, as it could not by possibility have misled the defendants, ought not, under section 169, to have been wholly disregarded. It can hardly be said that the cause of action alleged in the complaint was unproved in "its entire scope and meaning," and if not, there was no "failure of proof" within the meaning of the Code. (Code, § 171.)

It is not necessary, however, to place our decision upon this ground, since there is another, upon which, with entire satisfaction to ourselves, it may be placed. The letter of the defendants, stating the terms of the arrangement which they had made with Bailey & Brothers, was read in evidence without objection, and its contents—the facts it proved—were alone sufficient to establish the right of the plaintiff to recover. It was not at all necessary to prove, in addition, that the notes of Bailey & Brothers, taken under the arrangements, had been in fact negotiated or paid; hence, the referee might, with entire safety, have rendered a decision in favor of the plaintiff upon the evidence before him, leaving it to the court, in the exercise of the discretion given by section 173, and in manifest furtherance of justice to sustain a judgment, upon his report, by so amending the complaint as to conform its allegations to the facts as proved, and such, in our opinion, is the course that the referee ought to have followed, such the decision he ought to have made.

The judgment appealed from must, therefore, be reversed, and there must be a new trial, with costs to abide the event. If the plaintiff so elect. the order for a reference will be vacated.

CLARK and McCONNIN v. J. DEARBORN, impleaded with A.
DEARBORN.

When one member of a firm makes a note in the firm's name, and puts it in circulation, and it is shown that it was made without the knowledge or consent of the other partner, and for a matter not relating to the partnership business, an indorsee cannot recover against the latter, without proof that he took it before maturity, in good faith, and for value. Evidence that such note with others was "passed to the plaintiffs for goods sold," and that "these notes were left with the plaintiffs as collateral security," is not sufficient to establish that the plaintiffs parted with the goods on the credit and security of the note.

The same is true as to a note made by one member of a firm, in the firm's name, after its dissolution, and lent to the payees, without the authority or consent of the other partner.

When a note thus made comes into the hands of an indorsee for value, it is a question of fact for the jury, whether such indorsee took it with notice of the dissolution of the firm.

The fact that an account which had been opened with a bank, in the firm's name, during its existence, was continued in such name to the date of the note, cannot be proved by parol, without producing the books of the bank, or connecting the defendant, not signing or assenting to the note, with such subsequent transactions. The books themselves are the best evidence of the dates of the entries, and of the contents or terms of such entries.

The jury should dispose of all controverted questions of fact, and when a verdict is taken subject to the opinion of the court at General Term, it should be on questions of law only. And although liberty be reserved to the court to find the facts, it cannot at General Term undertake, with propriety, to do so, especially if it be found in favor of a party who has been permitted to give incompetent testimony against the objection and exception of the adverse party, and the finding must be founded, in part, on such evidence.

(Before DUEB, BOSWORTH and WOODRUFF, J.J.)

Dec. 1, 1856; Feb. 14, 1857.

THIS action came before the court, at General Term, on a verdict taken, subject to the opinion of the court, for the plaintiffs. It was brought on a note alleged to have been made by the defendants, in their firm name of "J. & A. Dearborn & Co.," dated at the city of New York, the 28th day of December, 1853, payable four months after its date, to the order of D. O. Ketchum & Co., for \$705.31, and to have been indorsed by the payees, and to have become the property of the plaintiffs, for value paid for it before it was due.

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The answer of John Dearborn, who alone defended, averred that the defendants did not make the note; that, at the time it was made, Alexander Dearborn, the other defendant, was not his partner, and that there was then no such firm as "J. & A. Dearborn," and put in issue the indorsement of the note by the payees, and the plaintiffs' ownership for value. It also averred that the note was made by Alexander Dearborn, at the request of, and for the accommodation of the payees, and without any authority given to Alexander Dearborn to bind John Dearborn, or make him liable by reason thereof.

The action was tried before Slosson, J., and a jury, on the 19th of March, 1855.

It was proved that the firm of J. & A. Dearborn was dissolved on the 1st of February, 1853; that Alexander Dearborn made the note without consideration, and to accommodate the payees, and delivered it to D. O. Ketchum, one of such payees. The evidence as to the transfer of it to the plaintiffs, and as to the consideration paid by them for it, was that of D. O. Ketchum, and is as follows: He said,—

"I passed this note to the plaintiffs with other notes; in all, the sum of one thousand dollars, for goods sold to us by the plaintiffs.

"Q. Were these notes left with plaintiffs as collateral security? [Question objected to by the plaintiffs' counsel. Objection overruled; and to the decision in that behalf the counsel for plaintiffs then and there duly excepted.]

"A. They were."

This was the whole evidence on that point.

To show that the defendants had done acts, in the firm name of & A. Dearborn, after the 1st of February, 1853, in addition to other evidence given, the plaintiffs called, as a witness,

Robert Leonard, who, being duly sworn, deposed as follows:—

"I was a book-keeper in the Butchers' and Drovers' Bank in the year 1855, in and previous to the month of December of that year; I knew of an account being kept there of J. & A. Dearborn, but not of the firm.

"To how late a day did you know of such an account being kept in the bank?

[Objected to by the counsel for defendant John Dearborn, on the ground that the books of the bank, in which the account is kept,

should be produced, and that John Dearborn should first be personally identified or connected with the account. The objection was overruled and the question allowed, and to the decision in that behalf the counsel for said defendant then and there duly excepted.]

"A. The account was kept until the 31st day of August, 1854; it might have existed several years previous to my going there; I kept the account from July, 1853, to 31st of August, 1854; I don't know who constituted that firm, nor can I say when the account commenced."

The plaintiffs were not shown to have had any dealings with the defendants' firm, which the witnesses sometimes spoke of as J. & A. Dearborn & Co., and sometimes as J. & A. Dearborn; and no notice of its dissolution was shown to have been published in any newspaper.

The printed case states, that on the evidence being closed, the court directed the jury to find a verdict, by consent of parties, for the plaintiffs, in seven hundred and forty-nine dollars and eleven cents damages and costs, subject to the opinion of the court, at a General Term thereof, on the questions of law, and also as to the facts, as if they were before a jury, (except as to the fact specially found by the jury, under the question specially propounded, as to which the finding of the jury was to be conclusive) with liberty to turn the case into a bill of exceptions or special verdict.

The court also charged the jury, and directed them to answer the following question :

At the time of the making of the note in question, December 28th, 1853, did D. O. Ketchum know of the dissolution of J. & A. Dearborn & Co., and of the withdrawal of Alexander from the firm ?

The jury answered, Yes; and thereupon found for the plaintiffs, as directed by the court, and the verdict was entered accordingly.

Thaddeus H. Lane, for plaintiffs.

John Graham, for defendant.

BY THE COURT. BOSWORTH, J.—The note, on which this action was brought, bears the copartnership name of "J. & A. Dear-

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born," and is dated the 28th of December, 1853. That partnership was dissolved on the 1st of February, 1853. The note was made, and the partnership name signed to it, by Alexander Dearborn, without the knowledge or assent of John Dearborn. The note was made for the accommodation of D. O. Ketchum & Co., the payees. D. O. Ketchum, who received it from Alexander Dearborn, and who indorsed and passed it to the plaintiffs, knew when he took it that the firm of J. & A. Dearborn had been dissolved.

If there were no other obstacle to a recovery, the plaintiffs would be required to prove, in order to maintain their action, that they took it in the regular course of business, and paid value for it. The only evidence on this point is, that "D. O. Ketchum & Co. passed this and other notes to the plaintiffs, amounting in all to the sum of \$1000, for goods sold to his firm by the plaintiffs. These notes were left with the plaintiffs as collateral security."

This evidence does not show that the goods were sold and delivered on the security of these notes. If the notes were transferred after the sale and delivery of the goods, as security for a pre-existing indebtedness, the plaintiffs are not holders for value, within the meaning of the rule, which protects a *bona fide* holder for value, against a defence based upon the fact, that the note was made by one partner without the knowledge or consent of the other, for a matter in nowise connected with the business of the copartnership.

The burthen of proof was on the plaintiffs. The facts were all within their own knowledge, and the evidence of them within their own control. The only witness examined upon the point, and he was a party to the transfer, could have testified whether the goods were, in fact, sold and delivered on the credit of the notes. All that he said is entirely consistent with the fact, that the notes were transferred after the sale and delivery of the goods, to secure a pre-existing debt. He does not say that this is not the truth of the transaction.

He does not say the notes were received as payment. His testimony is express that they were left as collateral security. He does not testify that they were left when the goods were purchased, or that they were then agreed to be left as security for the payment of the goods, and were subsequently transferred in pursuance of that agreement. At least, that much he was required

to prove, and not having proved it, he is not entitled to recover for that reason, if there were no other.

The evidence given does not justify the inference, in favor of a party who was bound to establish the fact affirmatively, that the plaintiffs parted with the property on the credit and security of the note.

But even if the plaintiffs paid value for the note, or parted with the property on the credit and security of the note, it would then become important to determine, whether they took it without notice of the dissolution of the firm of J. & A. Dearborn. The plaintiffs are not shown to have had any dealings with the firm. No notice of its dissolution was published in any newspaper. It then became important to ascertain in what manner the members of the firm had conducted after the dissolution took place. Nearly eleven months intervened between the time of the dissolution and the date of the note. The acts of the parties may have been such as to justify the inference, that the fact of the dissolution of the firm had become as notorious as that of its previous existence.

And the acts of the parties may have been such as to justify the inference, that the fact of the dissolution had not become generally known, and that knowledge of it, in all reasonable probability, was possessed by those persons only, to whom actual notice had been given.

Among other evidence, given to prove that the facts of the case were consistent with the latter hypothesis only, Robert Leonard, a book-keeper of the Butchers' and Drovers' Bank, testified that "J. & A. Dearborn," kept an account in that bank down to the 31st of August, 1854.

After he had testified that he knew an account of J. & A. Dearborn was kept in that bank, he was asked this question: "To how late a day did you know of such an account being kept in the bank?"

The counsel for John Dearborn objected to the question, on the ground that the books of the bank in which the account is kept should be produced, and that John Dearborn should first be personally identified or connected with the account. The objection was overruled, and the question allowed to be put, and the counsel of John Dearborn then duly excepted to the decision.

This decision, for all practical purposes, allowed parol evidence

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to be given of the contents of the books. The witness was, in effect, asked to state, and, in fact, did state, the dates of the entries, notwithstanding the objection that those facts could only be proved by the books themselves.

If it be assumed that competent proof of the fact of the entries would make them evidence, that such transactions as they indicated had been had between the bank and the late firm of J. & A. Dearborn, at the times the entries bear date, without showing that the acts which they recorded had been done by one of that firm, it is quite clear, as we think, that the books were the best evidence of the date of the entries, and of the contents of the entries themselves.

The objection having been taken, that the books were not produced, and that parol proof of their contents could not be allowed, we think the Judge erred in admitting the evidence.

Even if the court would consent to find the facts, which should have been found by a jury, and if it should find that the plaintiffs, when they took the note, had no knowledge of any facts and circumstances which should have induced them, as men of ordinary caution and prudence, to suspect that a dissolution had taken place, as such fact would be found in part upon incompetent evidence, which has been received against the objection and exception of the defendant, our judgment would be erroneous, if in favor of the plaintiffs.

Whether the plaintiffs had knowledge of the dissolution of the firm, if they had previously heard of its existence, was a question of fact for the jury.

The defendant was undoubtedly bound to show, as against the public, that notice of the dissolution had been published, or such acts as were equally well calculated to apprise the community of that fact.

As illegal evidence was admitted against the objection of the defendants, and no judgment can be given for the plaintiffs on the finding of any fact in their favor, in proof of which such evidence was admitted, the verdict must be set aside, and a new trial granted, with costs to abide the event.

GEORGE S. ST. JOHN v. THE MAYOR, ALDERMEN, ETC., OF THE
CITY OF NEW YORK.

The corporation of the city of New York have full authority, under their charter, to establish public markets and market-places in any location where, in their judgment, the interests or convenience of the public will be promoted by the measure.

The owners of houses and lots upon a market-place hold in subordination to the right and duty of the corporation, to do whatever is necessary for the maintenance of the market.

Such owners must, therefore, submit to whatever inconveniences and losses may result to them from a just exercise by the corporation of its powers and authority.

When the rebuilding or repairing a market requires a temporary obstruction in the street or passage in the market-place, the public and adjacent owners must submit to the inconvenience in consideration of the paramount interests of the public, for whose use public markets are established and maintained.

An adjacent owner may be entitled to maintain an action for damages against the corporation, where the obstruction, taking into view the nature of the work to be done, and the necessity of providing in the market-place suitable accommodations for those having the right of selling provisions in the market, is unnecessary and unreasonable, or when it creates a nuisance more noxious and offensive than is ordinarily incident to a market-place when kept in proper order and condition for market purposes, or when the obstruction is continued beyond a reasonable time; but whether, upon all or any of these grounds, the plaintiff, in such an action, is entitled to recover, is a question of fact for the determination of the jury.

Held, that upon the trial, these questions, upon the evidence that had been given, ought to have been submitted to the jury, and that the Judge erred in giving to the jury a peremptory direction to render a verdict for the plaintiff for the damages claimed.

Upon the trial, evidence was admitted to show the amount of the loss sustained by the plaintiff in his business, as the keeper of a refectory, by proving the actual diminution of his receipts, and the increase of his expenses, during the continuance of an obstruction created, by authority of the defendants, in the street in front of his dwelling, and by connecting the loss thus resulting with the obstruction, as its necessary or probable cause, and the Judge instructed the jury that the plaintiff was entitled to recover as part of his damages the loss thus proved, and was not bound or limited to show what particular persons had withdrawn their custom from the plaintiff in consequence of the existence and continuance of the obstruction.

Held, that had the plaintiff made out his title to recover at all, the evidence in question was properly admitted, and the instruction given to the jury entirely correct, the case belonging to a class in which the loss of profits is a proper

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measure of damages, and the evidence directly tending to show the extent of such loss.

New trial; costs to abide event.

(Before Duer, Bosworth, and Woodruff, J.J.)

December 1, 1856; February 14, 1857.

MOTION on the part of the plaintiff for judgment upon a verdict in his favor, taken subject to the opinion of the court at General Term, upon the exceptions stated in the case, upon which the motion was made, to the ruling and charge of the Judge upon the trial.

The nature of the action, (which was tried before Duer, J., and a jury, in January, 1856,) the tenor of the pleadings, the facts in evidence, and the questions of law arising upon the exceptions, sufficiently appear in the opinion of the court.

A. J. Willard, for the plaintiff.

Wilcoxson, for the defendants.

BY THE COURT. WOODRUFF, J.—The complaint herein avers that the plaintiff is the occupant of certain premises situated upon Catharine slip in this city, used as a refectory and lodging-house. That the premises are situated directly opposite to a public market and near to a public ferry, and “that the street has been, was, and is a great public thoroughfare.” That the prosecution of the plaintiff’s business and the public health and convenience required that “the said street” should be kept free and clear of and from all permanent obstructions of every kind.

The complaint then proceeds to charge the defendants with having erected, or caused, or permitted, or ordered and directed to be built upon and about the side-walk and street adjoining the plaintiff’s premises, divers stalls for the sale of meat, vegetables, and other articles usually sold at markets, amounting to, being, and constituting an appropriation of the public street, to the plaintiff’s injury, etc. It states the continuance of those stalls and their use for the purposes aforesaid, by various persons, from June 29th to September 25th, 1854.

That the effect was, to obstruct the side-walk, render the street inconvenient for use, collect around the plaintiff’s premises garbage

and filth, offensive and injurious, etc., and in other ways stated, interfering with, suspending, interrupting, and obstructing the due prosecution of the plaintiff's business by keeping away his patrons and visitors, etc.; whereby he lost gains, profits, etc., etc., and is damaged to the amount of two thousand dollars.

The defendants answer by a general denial of all the plaintiff's allegations.

Upon the trial, the jury were instructed unqualifiedly in these terms: "The plaintiff is entitled to recover; and you have only to assess the damages."

The defendants having put in issue all the allegations in the plaintiff's complaint, the latter was bound, in order to entitle himself to such an instruction, to establish, by evidence uncontroverted and admitting of no reasonable doubt, every fact essential to his right to recover. We think the case, as disclosed by the evidence, did not warrant any such peremptory direction.

The evidence showed, without contradiction and without any controversy or question, that the plaintiff's premises were situated on a market-place in the city of New York, having a passage along the front of the premises, and a side-walk. Whether such passage was ever laid out as a street or highway, or how or when, was in no wise proved nor attempted to be proved.

The proper inference, from the language of the witnesses is, that this passage was used as a street between the front of the plaintiff's house and the market, and used as such not only by the plaintiff and his customers, but by passengers to and from the ferry at the foot thereof at the East River. But whether it was an ancient highway, or a street opened as such, or simply an open space appropriated for a market-place—its use as a street being only incidental and subordinate to its use for the main object to which it was appropriated, viz., the purposes of the market—the plaintiff did not show.

The evidence also showed that the reason for the temporary obstruction of this passage and side-walk was the rebuilding of the market. The defendants were the proper party to cause such rebuilding, and whose duty it was, if the public convenience required it, to rebuild and repair; and from the authority and duty of the defendants to provide, repair, rebuild, and superintend the public markets, results the inference that it was done by their

authority, when their ordinary agents and officers, the superintendent of streets, superintendent of markets, and clerk of the market, are shown to have been acting in the matter.

It is quite clear that under their charter the defendants have all needful authority for this purpose, and that the owners of houses and lots upon a market-place hold in subordination to the right and duty of the defendants to do whatever is necessary for the maintenance of the market, and they must submit to whatever inconveniences necessarily result from the exercise of this authority. The location selected by the present plaintiff had its advantages and its disadvantages; its contiguity to the market-place, where multitudes resorted daily, rendered it valuable for the purposes of the plaintiff's business. He suffers no wrong if, while he gathers the fruits of this incidental benefit, he also yields to the demands of the public and realizes the disadvantages of his voluntary location, when the repairs or rebuilding of the market necessarily interrupt or diminish the gains he ordinarily receives. If the rebuilding of the market required a temporary obstruction of the street or passage in the market-place in front of the plaintiff's premises for a reasonable time, while the work was in progress, the public and adjacent owners are bound to submit to the inconvenience for the sake of the greater and paramount welfare of the same public for whose use the public markets are authorized by law to be built and maintained. (City Charter, § 17; Ordinances read in evidence; *Wilkes v. The Hungerford Market Co.*, 2 Bing. N. C. 281.)

This view of the subject would not authorize obstructions which were not reasonable under the circumstances, taking into view the work which was to be done, and the propriety and necessity of providing within the market-place suitable accommodations for the sale of provisions during the progress of the work; nor would it authorize the defendants themselves to maintain a nuisance, in the sense of that which is noxious or offensive, beyond what is ordinarily incident to a market-place when kept in proper order and condition for market purposes. Nor would it authorize the continuance of such obstruction for an unreasonable time.

But it may be added, that there is nothing in the proofs in the case which shows that the market-place in question was not so established, and of such a character that the defendants may not

appropriate the whole space set apart as a market-place to use as such by the erection of stalls or market-buildings thereon, if in the exercise of their authority they determine that it is required by the public interest and convenience. And in respect to the acts or neglects of the tenants of the stalls, by which the stalls occupied by them became offensive, the question of the defendants' liability will depend upon the inquiry, whether they have neglected any duty which they owe to the public and to occupants of the neighborhood to see to it, that the public places in the city are kept in a proper condition.

The case of *Lacour v. The Mayor, etc.*, (3 Duer, 406,) and the authorities there cited, may be profitably consulted for the principles bearing upon this subject.

Assuming, then, that the rebuilding of the market was done by the authority of the defendants, and that during its progress any other parts of the market-place might temporarily be used for market purposes, of which we entertain no doubt; and assuming that the defendants, under the evidence, sufficiently appear to have authorized the erection and sanctioned the continuance of the sheds complained of, we think that the ruling upon the trial proceeded upon an erroneous assumption in regard to the defendants' liability. The form in which the case is presented to us suggests that this ruling was made for the purposes of the trial in order that the question might be presented to the General Term for more deliberate consideration.

The question to be determined, was not merely whether the passage in front of the plaintiff's house was obstructed, but also whether access to his premises was obstructed unnecessarily and unreasonably, or for an unreasonable time; and also, if the right of the defendants to cause the obstruction was conceded, or appeared from the evidence, then whether it was needlessly offensive or noxious, and the defendants caused the nuisance in this latter sense, or neglected any duty which they owed to the plaintiff by not abating it, if it proceeded from the acts or neglect of the tenants of the stalls or sheds, and the same was for these reasons needlessly injurious to the plaintiff.

During the erection of the new building, we cannot doubt the right and duty of the defendants to continue to provide proper places for the sale of provisions within the limits of the market-

place if there be space for that purpose, and if this be done for a reasonable time only, and in a proper manner, the plaintiff and others though put to temporary inconvenience, and, perhaps, subjected to pecuniary loss, have no right of action. The very location they have selected subjects them to the consequence of a rightful exercise of the defendants' duty and authority for the public good.

In regard to the ruling on the trial in receiving evidence to prove the plaintiff's damages, there was no error, if the defendants are liable at all, and so far as they are liable, they are bound to recompense the plaintiff for the damages even necessarily produced by their acts, under the view above suggested.

It is not denied that loss of custom is a proper ground of recovery.

To prove this was the object and direct tendency of the evidence. The plaintiff showed the actual receipts of his hotel for a year or more, previous to the obstruction complained of, the actual daily receipts during the continuance of the obstruction, and again, the actual daily receipts for some months after the obstruction was removed.

This furnished the means of computation and of satisfactorily ascertaining the diminution of receipts. He also showed that the expenses were in the same, or about the same, ratio to the receipts during the whole period. When it is borne in mind that the plaintiff kept a refectory and lodging-house, the resort of daily visitors for their various meals, and of transient persons for their lodgings, it is difficult to suggest any other mode of ascertaining the effect upon the plaintiff's business than this. To say that he must prove what persons were prevented visiting his house, and what meals they would have taken and paid for, is to suggest a mode of proof obviously impracticable, and if it was done, it would still leave the same inquiry: what would have been the profits upon the meals they took and paid for? which is now objected to.

The loss of custom, and the consequent loss of profits, is the very matter to be recompensed in this action, and the cases to which we are referred, in which loss of profits, it is said, cannot be recovered for, are not analogous.

In *De Wint v. Wilts*, (9 Wend. 325,) plaintiff recovered for loss of the rent he had been accustomed to receive for a house he

had erected to be let as an inn or tavern, although in general, in actions for breach of contract, loss of profits is not recoverable. (See *Blanchard v. Ely*, 21 Wend. 350; *Downie v. Potter*, 5 Denio, 306; *Giles v. O'Toole*, 4 Barb. 261.)

And purely contingent or speculative profits, it is sometimes said, are not the subjects of recovery. This is a somewhat loose statement of a proposition which does not exclude all reference to probable profits. It is undoubtedly true, under some circumstances, in every sense, e. g., A agrees to let a tavern-house to B, and afterwards refuses to give a lease. The actual value of the house, contrasted with the sum paid or to be paid, therefore, is the damage sustained; and yet the elements of value consist in location, good will, if any, the long habit of travellers to resort to a well-known stand, and like circumstances, and the experience of the past must necessarily enter into the estimate of both the witnesses and the jurors. On the other hand, if a house be hired for a dwelling, the cost of another having equal advantages is the only guide in determining the damages.

One who fails to build and finish a house within a time specified in his contract, renders himself liable to pay what the use of the house is worth during the period of delay, and not the possible or probable profits of a business which a man may or may not, at his option, carry on within it.

Actions on the case for consequential damages, caused by the defendant's fraud or tort, proceed upon a more liberal view of the measure of compensation; e. g., fraudulent violation of an agreement intended to preserve the good will of a business; a slander of a man in his profession, or of a merchant in his credit, and like cases of consequential injury, in which the measure of damages is not necessarily fixed and certain.

The value of goods to be carried, at the place of delivery.

These and many other cases necessarily bring the subject of profits into view.

To illustrate this precise case, suppose a *tort feasor* had, on a given day, by some wrongful means, prevented any customers visiting the plaintiff's house, can it be doubted that, in an action for the consequential damages, he would be liable for the loss sustained by the plaintiff thereby? I think not; and the mode of proving the loss would be just the one adopted on the present trial.

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In *Finch v. Brown*, (13 Wend. 601,) the Supreme Court, and, in *Fitch v. Livingston*, this court held that in case of wrongful collision, the party wrongfully injured could not by a proceeding by attachment, under the statute, obtain a lien for any thing beyond the actual injury to the vessel and cost of repairs; but in both cases it is suggested, that in an action on the case for consequential damages, the owner may recover for loss of earnings. See *Masterton & Smith v. Brooklyn* (7 Hill, 61). The right to recover profits that are the immediate and direct consequence of even a breach of contract is sanctioned.

The case of *Wilkes v. The Hungerford Market Co.*, (2 Bing. N. C. 281,) is like the present, and warrants the recovery of the damages claimed.

Iverson v. Moore, (1 Ld Raymond, 486,) and cases therein cited, are to the like purport; and in *Lacour v. The Mayor*, (3 Duer, 406,) above referred to, the right to recover for similar damages is discussed and fully recognized by this court.

Upon the ground first suggested, a new trial must be ordered; costs to abide the event of the suit.

ASA WILLIS v. JOHN ORSER, Sheriff.

The complaint stated that on the 15th of November, 1854, the plaintiff was the owner, as mortgagee, of certain articles of merchandise particularly described, and that these articles on the 14th of December, in the same year, were in the possession of, and in a store occupied by the mortgagor, W. B. Willis; that the sum secured to be paid by the mortgage was payable on demand, and that prior to the 14th of December, its payment was demanded and refused; the plaintiff on the trial offered to prove that the possession of the merchandise was in fact changed, on the 15th of November, by its delivery to him on that day, but the court were of opinion that the variance between the proof so offered and the allegations in the complaint, was material, and, therefore, excluded the evidence.

Held, that there was a reasonable interpretation of the allegations in the complaint, by which the supposed variance would have been wholly removed, and that this interpretation ought to have been adopted on the trial; consequently that the proof offered ought not to have been excluded.

Held, that under § 169 of the Code, the alleged variance ought not to have been deemed material, since it did not appear that the defendant had been actually misled to his prejudice, in maintaining his defence, and there was no affidavit to that effect.

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Held, that upon the evidence in the case, the court had no right to consider the question, whether the mortgage to the plaintiff was fraudulent or not. New trial ordered, costs to abide the event.

(Before Duer, Bosworth and Woodruff, J.J.)

Heard, December 4; decided, February 14, 1857.

MOTION on behalf of the plaintiff for a new trial, upon a case containing exceptions that were directed to be heard, in the first instance at General Term.

The action was brought to recover damages for an alleged wrongful seizure and sale by the defendant, under order of his office as sheriff, of certain goods and merchandise belonging to the plaintiff.

The complaint stated that the plaintiff on or about November 15th, 1854, became the owner of certain goods and merchandise, particularly described, by virtue of a mortgage upon the same, for \$1000, bearing date on the same 15th day of November, 1854, and on that day, made, executed, and delivered to the plaintiff, by one Wm. B. Willis; that the same mortgage was duly filed, and that the said articles of merchandise were in the possession of, and situated in the store occupied by Wm. B. Willis, in Spring street, in the city of New York, until on or about the 14th day of December, 1854; that the sum of money aforesaid was payable, by the terms of the mortgage, to the plaintiff upon demand, and that prior to the said 14th day of December, its payment had been demanded by the plaintiff and refused; that the defendant on or about the 14th day of December, then being sheriff of the city and county of New York, by virtue and under color of his office, forcibly and wrongfully took possession of the said goods and merchandise, and wrongfully sold and disposed of the same, although forbidden by the plaintiff, and having notice at the time of the plaintiff's title as mortgagee and owner, and that the said goods and merchandise, were of the value of \$1000, for which sum, with interest and costs, the complaint demanded judgment.

The answer of the defendant, after denying specifically the allegations of the complaint, sets up as a separate defence, that the goods in question were rightfully seized and sold by the defendant as sheriff, under and by virtue of certain executions against W. B. Willis; that the same were then in the possession of the said Willis, and were his property, or that he, Willis, had an in-

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terest therein, liable to a levy and sale on an execution against him.

The case was tried upon the issues made by the pleadings before Slosson, J., and a jury, at a trial term in December, 1855.

Upon the trial, the mortgage to the plaintiff was produced and read, and its execution, delivery, and consideration proved. The mortgage was conditioned to be void if the mortgagor should pay to the mortgagee, his executors, etc., on demand, the full sum of \$1000; and the mortgage also contained a provision, that, in case default should be made in the payment of the said sum, it should be lawful for the mortgagee, his executors, etc., to take and carry away the goods and chattels mortgaged, and to sell and dispose of the same.

The plaintiff then offered to prove by Wm. B. Willis, that the possession of the property contained in the mortgage was changed from the witness to the plaintiff, on the 15th of November, 1854, the day on which the mortgage was executed. The defendant's counsel objected to this testimony on the ground that it was in conflict with the allegation in the complaint, that the property was in the possession of Wm. B. Willis until on or about the 14th day of December, 1854. The court excluded the evidence, and the plaintiff's counsel excepted to the decision.

The counsel for the plaintiff then offered to put to the witness several distinct questions, all of which were overruled by the court upon the ground that the object in each was to show that there was a change of possession on the 15th of November. In each case the plaintiff's counsel excepted to the ruling of the court. The answer of the witness, to the questions proposed, would have shown the nature and character of his own possession from the 15th of November until the 14th of December.

The counsel for the plaintiff then moved to amend the complaint by inserting an allegation, under which the evidence excluded would have been plainly admissible. The motion was denied, and the counsel excepted. No further proof being offered on the part of the plaintiff, the defendant offered to prove the judgments and executions set forth in his answer, but the Judge held the proof to be unnecessary, and upon the motion of the defendant's counsel, dismissed the complaint with costs, directing the exceptions to be heard in the first instance at General Term.

J. Graham, for the plaintiff, was now heard in support of the exceptions, and a motion for a new trial. He contended that there was no contradiction between the proof offered and excluded, and the allegations of the complaint; and that if there was any variance, the amendment for which he had moved ought to have been allowed, as there was no affidavit that the defendant was actually misled.

E. W. Stoughton, for the defendant, insisted that the variance between the evidence excluded and the allegations in the complaint was certain and fatal, and that as the evidence, if admitted, would have changed materially the issues made by the pleadings, the Judge upon the trial, even under the liberal provisions of the Code, had no power to grant the amendment that was desired.

The counsel also insisted, that it sufficiently appeared, from the evidence in the case, that the mortgage to the plaintiff was fraudulent and void.

BY THE COURT. DUER, J.—It is difficult to understand upon what ground the complaint was dismissed. In proving the execution, delivery, and consideration of the mortgage, it seems to us the plaintiff had given all the proof that in the first instance would be required to entitle him to recover. There is no pretence for saying that the mortgage was fraudulent on its face, and whether it was rendered so by the continuance in possession of the mortgagor, was a question of fact for the determination of the jury. Still, as it does not appear from the case, that there were any exceptions to the charge of the Judge on the trial, we have probably no right to place our decision upon the ground that has been stated, especially as this ground was not insisted upon by the counsel for the plaintiff upon the argument before us.

We proceed, then, to the main question actually raised by the exceptions on the trial, and to which the argument of the plaintiff's counsel was confined, namely, whether the additional proof that was offered, on the part of the plaintiff, ought to have been excluded? and, after much consideration, we are satisfied that the proof ought to have been admitted. We are satisfied that if admitted, so far from contradicting, it would have been entirely consistent with the allegations in the complaint reading those allega-

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tions in their proper connection, and giving to them a fair and reasonable interpretation. The complaint avers that the plaintiff, on the 15th of November, was the owner of the property mortgaged, and the averment may well be construed to mean that he was, on that day, the absolute owner. Hence, the averment that follows, that Willis, the mortgagor, was in possession of the property from the date of the mortgage until the 14th of December, the day on which the sheriff made the levy, to render it consistent with the previous averment, may very properly be understood as referring to a possession in consistency with, and in subordination to, that of the plaintiff as owner. In other words, that his possession was merely that of a bailee, or agent, of the plaintiff. The proof that such was the true character of his possession, might very properly have been admitted, under the offer that was made, and the questions that were proposed. And had it been proved, upon the trial, that payment of the mortgage debt had been demanded, and refused, on the 15th of November; that the goods, etc., mortgaged were then delivered to the plaintiff as owner, and that he had placed the mortgagor in possession, as his agent for the sale of the goods, and that all the subsequent sales were on his account, we hold that it would be impossible to say that the proof would not have been consistent with the very words of the complaint; and it is equally clear that it would have entitled the plaintiff to recover, unless the defendant had then proved that the mortgage was fraudulent. Such, however, might have been the purport of the evidence that was offered to be given, and which the Judge excluded.

Again, the complaint avers that the payment of the mortgage debt was demanded by the plaintiff, and refused by the defendant, prior to the 14th of December, and we see no reason to doubt that, under this averment, and the offer made on the trial, the plaintiff might have shown that the demand and refusal of the payment of the debt were, in fact, made on the 15th of November. Had this proof been admitted, it would have shown that, from that day, the right of the mortgagor to retain the possession of the property wholly ceased, and, consequently, from that day he had no longer any interest in the property that could properly be made the subject of a levy or sale, under an execution against him. Hence, the proof would have shown that the defendant, in making such

levy and sale, was a mere trespasser, and, as such, necessarily liable to the plaintiff for the value of the property levied on and sold. It would, therefore, have thrown on the defendant the burden of justifying his acts, by proving the defence set up in his answer, and this he could only have done, by showing that the mortgage, as against the execution creditors, was fraudulent and void. It follows, we think, from these observations, that the supposed variance between the proof that was excluded and the allegations in the complaint, which, if it existed at all, was purely literal, might justly have been deemed immaterial, as the case stood when the evidence was offered. The plaintiff had proved all that he was bound to prove, in order to maintain his action, so that the only issue that remained to be tried, was that of the validity of the defence set up in the answer and the burden of proving, which rested solely on the defendant. It does not appear, nor can we understand how, the reception of the evidence that was excluded could here have misled the defendant to his prejudice in maintaining his defence, and no proof that he was so misled was given or offered. (Code, § 169.) We cannot assent to the allegation that the reception of the evidence would have changed materially the issues made by the pleadings. The continuance in possession of the mortgagor, even upon the supposition that it was as mortgagor that he retained the possession, was consistent with the terms of the mortgage, and, therefore, raised no presumption of fraud upon which the plaintiff could insist, or the plaintiff be called on to repel.

The learned counsel for the defendant strenuously insisted, that the dismissal of the complaint by the court, on the trial, ought to be sustained, upon the ground that it sufficiently appears, from the evidence given, that the mortgage to the plaintiff was fraudulent and void, but we are very clearly of opinion that this is not a question that can now be entertained; the mortgage was certainly valid as between the parties, and it escaped the attention of the counsel that when the complaint was dismissed there was no proof that there was any creditor of the mortgagor by whom the validity of the transaction could rightfully be questioned. In saying this we are not to be considered as intimating that the evidence which appears in the case was sufficient to raise even a presumption of fraud. Whether the continued possession of the

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mortgagor was of such a character as to warrant this presumption, and whether the presumption, if raised, is repelled by evidence of the good faith of the parties, are questions of fact which, upon a second trial, it will belong to the jury alone to determine. Assuredly they are not questions which we, as a court, have any right to entertain and decide. (*Howland v. Willet*, 3 Sand. S. C. R. 607; *Stuart v. Slater*, ante p. 83.)

There must be a new trial, with costs to abide the event.

WILMOT, and others v. RICHARDSON, and others.

A person, not a party to the action, and who is rendered incompetent as a witness by reason of an agreement, subsequent to the transactions in question, making him a partner of one party as of a date prior to their occurrence, may be rendered competent by an absolute assignment of all his interest in the subject matter of the action and in the business of his firm down to the time he actually became partner, on being also released by his partner from all liability to contribute by reason of the claim made in the action, and on being fully indemnified against any liability connected with said claim or action.

The plaintiffs contracted to sell to one Patterson flour, and delivered to him one thousand eight hundred and ninety-seven barrels, and the defendants advanced to him, in good faith, on that and other flour, amounting in all to eight thousand one hundred and sixty-four barrels, large amounts from time to time, and consigned the whole to their Liverpool house. The plaintiffs, claiming that they had been induced to sell to Patterson by fraud on his part, after a discovery of the alleged fraud, and with knowledge of the advances made by the defendants, and of their claims by reason thereof, and of such shipment of the flour, received an order, drawn by Patterson on the defendants, for the net proceeds of the eight thousand one hundred and sixty-four barrels of flour, less the defendants' advances and charges, delivered such order to the defendants and received their written acceptance thereof, and, when such flour had been sold, received of the defendants and receipted for the net proceeds thereof and in full of such proceeds, as per their acceptance of Patterson's said order.

Held, that these acts amounted to a ratification of the transactions between Patterson and the defendants, and that thereafter the only liability of the defendants to the plaintiffs was such as arose out of the written acceptance of Patterson's order, and the agreement contained therein.

The fact that the defendants had had other large transactions with Patterson prior to the one in question, was not competent testimony upon the trial of the issue, whether the defendants acted in good faith in the transactions in question. It was irrelevant, and its admission erroneous.

A witness, whose character has been impeached, cannot be supported by the testimony of a person who saw him for some six months, twelve years prior to the

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trial, and who had not subsequently seen him until within six months of the trial, and had never heard him spoken of one way or the other, to the effect that, he considered him a credible witness. To receive such evidence against objection and exception is erroneous.

(Before DUNK, BOSWORTH and WOODRUFF, J.J.)

December 5, 1856; February 14, 1857.

THIS action comes before the court on exceptions taken by the defendants at the trial, and there ordered to be heard, in the first instance, at the General Term.

John Wilmot and Company are the plaintiffs, and do business in the city of New York. The firm of Thomas Richardson & Co., are the defendants, and do business in the same city; that firm consists of Thomas Richardson, James Spence, and Edward H. Paton. The defendants also did business at Liverpool, under the firm name of Richardson, Spence & Co. Samuel Nimmons became a partner subsequent to the transactions in question, but at the time thereof, had no interest in the business of the defendant's firm.

The complaint alleges that one Walter Paterson, in May, 1854, bought of J. Wilmot & Co. 1897 bbls. flour, for \$15,104.87, to be paid in cash on delivery, representing that it was for Thomas Richardson & Co., and that they "were to advance the cash for the same." That J. Wilmot & Co., on the 11th of May, delivered the flour on board ship, and on the 12th of May handed ship's receipts to Patterson, relying on his promise to get the money from Thomas Richardson & Co., and at once pay it over. That on the 13th of May, Patterson paid \$5000, stating that Thomas Richardson & Co. refused to advance as they had promised. That Thomas Richardson & Co. had already received the ship's receipts from Patterson, and J. Wilmot & Co. on same 13th of May, threatened them to stop the flour; but they replied that the ship had already sailed, and that they need not be alarmed, as the money would be paid. That this threat and response were repeated on 15th of May. That J. Wilmot met Patterson by appointment, at Thomas Richardson & Co.'s office, May the 17th, to receive the money, when Richardson, claiming to be busy, requested them to call at 12 o'clock. That Wilmot called, accordingly, but, in the interim, Patterson had been suddenly induced, by Thomas Richardson & Co., to sail, and had sailed, for Europe. That Thomas Richardson &

Co. then offered to pay John Wilmot & Co. the balance which might be due from them to Patterson, if released, which offer John Wilmot & Co. declined. That Thomas Richardson & Co. subsequently made certain payments, leaving a balance of \$7648.96. That Thomas Richardson & Co. knew all the facts, and contrived this method of obtaining payment of a prior debt from Patterson.

The defendants' answer first puts in issue the whole complaint, except the existence of their own firm, and that Wilmot and Patterson called when Richardson was busy, at about 10 o'clock, A. M., on 17th of May.

The defendants answered, secondly, that they agreed to advance Patterson \$7 per barrel on flour shipped by him to Richardson, Spence and Co., of Liverpool; that between 28th April and 12th of May, 1854, he accordingly shipped 8164 barrels flour, and delivered the bills of lading, &c., to Thomas Richardson & Co., and took the following advances:

1854, April 29,	. . . . .	\$19,000 00
May 1,	. . . . .	3,388 00
" 3,	. . . . .	5,000 00
" 8,	. . . . .	5,000 00
" 9,	. . . . .	13,279 00
" 10,	. . . . .	5,329 90
" 12,	. . . . .	6,651 10

That on the 17th of May, 1854, they accepted Patterson's order in favor of Jno. Wilmot & Co. for the net proceeds of the 8164 barrels of flour, after deducting advances and charges, and that subsequently, on September 13th, 1854, they paid over such net balance to Jno. Wilmot & Co., taking their receipt, expressed to be "balance in full of preceeds of sales of flour, as per your acceptance of Walter Patterson's order in our favor."

That Thomas Richardson & Co. acted in good faith, in the usual course of business, without knowledge whence the flour was obtained, and that, "with full knowledge of all the circumstances," Jno. Wilmot & Co. sued Patterson for the price of the flour.

It was proved that, on May 5th, 1854, J. Wilmot & Co. sold to Patterson 1897 barrels of flour, at \$7.93½ per barrel; total price,

\$15,104.87, for cash, on delivery of ships' receipts. 200 barrels were sent by them on board of the *Dacotah*, and 1697 on board the *Washington*. Hull, a witness for the plaintiffs, testified that the ship's receipts were obtained on May 12, and further, that on that day, Patterson sent McKeon, his broker, for them; that Mr. Wilmot declined at first to give them up, but gave them to McKeon on being informed that "Patterson said he could not pay for the flour till he got the receipts, as they had consigned it to Thomas Richardson & Co., and they would not give the money till he got the receipts." He also swore that he, Hull, gave the receipts to McKeon, and told him to go with Patterson, and not to deliver the receipts till he got the money.

Patterson was also sworn for plaintiffs, and testified that it was a purchase for cash, which by the usage, meant cash when called for. That Wilmot knew he was consigning flour to defendants' Liverpool house and getting advances. That he received \$13,279 as an advance on this flour, on the 9th of May, and delivered the bills of lading on the 12th of May. Supposed he promised the bills of lading when he received the advance. That he gave them the invoice on or before May 9, 1854.

On 16th of May, 1854, Thomas Richardson & Co. rendered to Patterson a complete and true account of their dealings and advances; and on the morning of the 17th, Wilmot saw and took a copy of it. After this, and on 17th of May, Jno. Wilmot & Co. obtained from Patterson an order on Thomas Richardson & Co. for surplus proceeds of 8164 barrels of flour, and on same day obtained Thomas Richardson and Co.'s acceptance of it. The account sales of the Liverpool house were given in evidence by the plaintiffs. And it was proven that Jno. Wilmot & Co. received from the defendants, and receipted for the net proceeds according to the order and acceptance, as stated in the answer.

Eleven witnesses testified that Hull was of bad reputation and unworthy of credit. The Judge at this point refused to hear any more impeaching testimony, and after some supporting proof, refused again. Defendants excepted to each decision.

The bill of lading for the 200 barrels, per *Docotah*, was signed May 8, 1854. Those 200 barrels were insured by Thomas Richardson & Co., May 3, 1854; and the 1697, by the *Washington*, were insured May 8, 1854.

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Patterson did not pay J. Wilmot & Co. their whole demand. By some unexplained means he became embarrassed after he purchased, and conceiving that it would be some advantage to him, or for some other reason, concluded to go Europe. He did so on 17th May, at noon. J. Wilmot became alarmed on the 16th of May, and on the morning of 17th May, went with Patterson to Thos. Richardson's to see what security could be got. Patterson concealed from Wilmot his intent to go Europe.

An unsuccessful attempt was made to prove that Thos. Richardson & Co. connived at this secrecy and advised the departure.

Patterson had known Thomas Richardson & Co. five or six years, and had known J. Wilmot and Co. only some weeks. And, by way of raising an inference of some fraud or collusion, the plaintiffs were allowed to prove that Patterson had had extensive dealings with the defendants; to which the defendants excepted.

Patterson himself testified that the purchase from J. Wilmot & Co. was without any particular stipulation as to the time of payment. He also testified, that when he purchased the flour, and received the ships' receipts, he honestly intended to pay. McKeon, the broker, being absent in Europe, was not examined. Patterson was not asked any questions tending to confirm Hull's statement as to the mode of obtaining the ships' receipts, or any special delivery of them; and he expressly swore that he never made any false or deceitful representations to the plaintiffs.

The plaintiffs proved by Patterson, that when he went to Liverpool, the defendants' house there seemed to expect him. He had mentioned it to defendants' clerk in New York, (perhaps at the last moment). And the defendants offered to read the letter of their New York house to the Liverpool house, on the 17th, stating the fact. The court excluded it, and the defendants excepted.

On the 20th of May, 1854, the plaintiffs prosecuted Patterson, by attachment on contract, in the Supreme Court, for the price of the flour. J. Wilmot's affidavit, in that case, sworn on that day, stating the sale and delivery of the flour to Patterson, was given in evidence. The fraud alleged was, in secretly departing with intent to defraud J. Wilmot & Co., and other creditors, or avoid process.

The Judge, in the course of his charge, said, that "on a fair

consideration of the evidence, there was no fraud on the part of the defendants, nor on the part of Patterson, in making the purchase."

He put the plaintiffs' claim to the jury on the point of a conditional delivery. He said that defendants had acted indiscreetly in parting with their money three days before they received the bills of lading; that if they had paid over the money after receiving the bills of lading they would not be chargeable.

In instructing the jury as to a conditional delivery, he presented the question thus: "Did plaintiffs part with the possession of the receipts with the understanding that Patterson should do with them as he pleased, or with the understanding that he should get the money and pay for the flour? If the latter, the sale was conditional; if the former, it was absolute." To each of these definitions of, or instructions as to, a conditional sale or delivery, the defendants excepted.

On a motion for a nonsuit, the defendants insisted that both the complaint in this action and the affidavit in the attachment suit alleged an unconditional delivery, and that, in the absence of any evidence of fraud in the contract, the plaintiffs could not recover. The point was overruled, and the defendants excepted.

The defendants requested the Judge to charge as follows:

"*Second.* If the plaintiffs sold the goods for cash on delivery, and afterwards delivered them on board, and also delivered the shipping receipts to Patterson unconditionally, such delivery was a waiver of any lien for the price, or any right to avoid the sale or to reclaim the goods, unless Patterson practised some fraud in obtaining the contract or in obtaining the delivery.

"*Third.* If the jury do not believe that the ships' receipts were obtained by any of the means or pretences, stated by Hull as having been made by Patterson or McKeon for that purpose, there is not any other evidence in the case from which they could infer that any fraud was practised in obtaining the delivery of the ships' receipts.

"*Fourth.* If Patterson, after the 12th of May, 1854, for the first time designed to go to Europe, and determined to conceal such intent, in order to avoid arrest, those circumstances would not constitute a fraud against the plaintiffs, or in any way affect the issue in this case.

"*Fifth.* If, on the 17th of May, 1854, with knowledge of the representations on which the ships' receipts are alleged to have been delivered by them, and after seeing, by the account dated May 16, 1854, that the advances on the flour in question had been made on the 9th of May, the plaintiffs received the order on Thomas Richardson & Co., for payment out of the net proceeds of their sales, caused such order to be delivered to the defendants, received the written acceptance thereof, and received and receipted for the net proceeds, such acts amount to a ratification or confirmation of the transactions between Patterson and the defendants, and, consequently, the plaintiffs cannot recover."

The court refused to give any of these instructions, and the defendants excepted.

On the point of ratification he stated the facts, and charged thus:

"The fact you are to decide is, Whether or not Wilmot ratified the sale. If you believe that it was understood that Wilmot should receive this balance in full of his claim, then he is bound; if he did not intend to give up his claim, he is not bound."

To which submission of the point to the jury the defendants excepted.

The verdict was for the plaintiffs, for \$8160.77.

The following points on the reception of evidence arose at the trial.

The defendants called seven witnesses to support the character of Hull. Two of them knew nothing of his reputation, and could not say whether it was good or bad, but they were permitted to answer the question: "Do you consider him a credible witness?" To this decision the defendants excepted.

The defendants offered as a witness, Samuel Nimmons. He was a clerk of Thomas Richardson & Co. at the time of the transactions in question, but was subsequently admitted as a partner, by a retro-active agreement, from a period previous to these transactions.

He was objected to as incompetent, and excluded. The defendants excepted.

The defendants then gave in evidence their release of said Nimmons from any contribution to the claim in this action, and also a bond of indemnity to him, with sureties, admitted to be sufficient, against any liability connected with said claim or action,

and also an assignment by Nimmons to the defendants, of all his interest in the flour aforesaid and its proceeds, and in the business of the copartnership, prior to the time of his actually becoming a partner. The Judge, nevertheless, ruled that said Nimmons was not a competent witness, and on his being again offered, excluded him. The defendants excepted.

The questions of law arising upon the exceptions taken at the trial, the court there ordered to be heard in the first instance at the General Term, and the entry of judgment to be in the mean time suspended.

Edwards Pierrepont, for plaintiffs.

C. O'Connor and *J. P. Martin*, for defendants.

BY THE COURT. BOSWORTH, J.—Was Nimmons rightfully excluded from testifying? He was not a partner of the defendants at the time of the transaction in question, nor had he any pecuniary interest then in the business of the firms of which they were members. The agreement of the 13th of October, 1854, creates the only objection raised to his competency as a witness; that was executed after the property in question had been sold by the defendants, and the proceeds of it had come into their hands.

If the question of his admissibility was to be determined by the rules of the common law, why was he not a competent witness when he was last offered?

At that time, he had assigned to the defendants, all his interest in the defendants' firm, as to all business transacted prior to the 23d of October, 1854. The defendants had released him from all liability to contribute towards the payment of any judgment the plaintiffs might receive, or for the costs or expenses of this action. They had also fully indemnified him against all liabilities and claims, to which he could be subjected by reason of this action, or of any thing growing out of it, and against all damage by reason of his liability to contribute to pay any judgment that might be recovered in this action, or to pay any part of the expenses thereof, or of the claims and demands of the plaintiff.

After those papers had been executed and delivered, it is diffi-

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cult to perceive why his legal position was not precisely the same as it was before that agreement was made. From that moment he ceased to have any interest in the result; whether the defendants succeeded or failed, was a matter of indifference to him in a pecuniary point of view.

Excluding the provisions of the Code, I think he was a competent witness, and that his rejection was an error which entitles the defendants to a new trial. (*Clarkson v. Carter*, 3 Cowen, 85; *Lifferts v. De Mott & Ingersoll*, 21 Wend. 136; *Small v. Mott*, 22 Wend. 403; *Gregory v. Dodge*, 14 Wend. 593; *Lake v. Auburn & Hodgkins*, 17 Wend. 18; *Benedict & Lothrop v. Hecox*, 18 Wend. 490).

It will not be seriously contended, that it was the object of the Code to increase the causes of incompetency to be a witness; on the other hand, it declares that a mere interest in the event, no matter how clear and direct, shall not render any person incompetent to testify, unless he be a party to the action, or one for whose immediate benefit it is prosecuted or defended. (Code, §§ 398, 399).

The Code retains the rule, that an interest in the event, shall disqualify, when the person offered as a witness is a party to the action, or if it is prosecuted or defended for his immediate benefit.

Such an interest excluded persons before the Code. By the pre-existing rules, a person for whose immediate benefit an action was prosecuted, if not a party to it upon the record, could be rendered a competent witness; that was expressly decided in *Lake v. Auburn & Hodgkins*, *supra*.

Without pursuing this question further, we think it quite clear, that as Nimmons was rendered incompetent to testify, solely by reason of the agreement of the 13th of October, 1854, that interest was wholly divested by the papers executed and delivered before he was last offered. From that time his position, in contemplation of law, was exactly the same that it was before the agreement of the 13th of October was executed, and he was a competent witness.

Next, as to the question of ratification. Patterson bought of the plaintiffs, 1897 barrels of flour. They had no interest in the residue of the flour, on which the defendants had advanced to Patterson. The defendants had made advances on 8164 barrels, all of which had been shipped to Richardson, Spence & Co. Be-

fore the 17th of May, the plaintiffs had in their possession, an account rendered by the defendants to Patterson, showing the transactions between them, the dates and amounts of their advances, and the number of barrels on which the defendants had advanced.

With full knowledge of all the frauds now alleged, (except the pretended fraud of Patterson's going to Europe at the instigation of, or by connivance with some one of defendants' firm) they received Patterson's order on the defendants, to pay to the plaintiffs the proceeds of the 8164 barrels, less the advances previously made by the defendants upon it, and their charges. Before this was accepted, Patterson's assent, written at the foot of the order, that no further advances should be made, by the defendants, unless by the consent of the plaintiffs, evidenced by their written order, was procured. The plaintiffs received this, with the written acceptance by the defendants of Patterson's order.

By this act the plaintiffs certainly waived all right to claim that a sale of the flour by the defendants would be a tortious act, which would render them liable for a conversion of the flour. They assented to a sale of so much of the flour as had belonged to them, and obtained an agreement that they should be paid the proceeds of not only that flour, but of six thousand two hundred and sixty-seven barrels in addition, to which they had no right, less advances and charges.

The flour has been sold as that arrangement contemplated, and the whole proceeds of the flour have been paid to, and accepted by, the plaintiffs, in full performance of that arrangement.

Before the defendants accepted this order, they had refused to accept a draft drawn on them by Patterson, in favor of the plaintiffs, for \$10,000, at sixty-five days from May 17, 1854. The defendants claimed to have advanced on the security of the flour, in good faith, with no notice of any facts which should induce any person to doubt the title of Patterson, or the good faith of his transactions with those of whom he had purchased the flour. Under these circumstances, the plaintiffs accepted the three papers before mentioned; viz., Patterson's order on the defendants; an acceptance of it by the latter, and Patterson's written consent that the proceeds should be paid to the plaintiffs, or to their order. Is this transaction to have any effect, and, if so, what? If it does

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not amount to an abandonment of all claims upon the defendants personally, except under their written acceptance of Patterson's order, then it is not only of no benefit to them, but is prejudicial to their rights. By the verdict they are charged, not only with the actual proceeds of the one thousand eight hundred and ninety-seven barrels of flour, but with the exact price which Patterson agreed to pay the plaintiffs for it. The defendants, as the case has resulted, have been made to pledge the proceeds of the whole eight thousand one hundred and sixty-four barrels over and above advances, as security to pay what Patterson was owing the plaintiffs, and are held personally liable to pay the balance of the contract price. This result has been effected upon evidence which, being fairly considered, does not tend to prove any "fraud on the part of Richardson, nor on the part of Patterson, in making the purchase." So the Chief-Justice instructed the jury.

In the absence of fraud, either of Patterson or of the defendants, in the transaction, we think that the acts of the parties on and after the 17th of May, amount to an agreement between them, that the whole flour on which the defendants had advanced, should be sold by the persons to whom it had been consigned, and that the defendants might retain out of the proceeds the amount of the advances which they had made on the security of the flour, and their charges, and that the balance of the proceeds should be paid to the plaintiffs. The advantage secured to the plaintiffs, was the contract of the defendants to pay to the former the whole net proceeds, beyond the advances and charges. This agreement has been fully executed on the part of the defendants. Any undeclared intent of the plaintiffs, in entering into the arrangement, cannot affect its legal operation, nor impose upon the defendants, or continue any liability on their part, which, in the absence of any such intent, would not exist. (*Freeman v. Spaulding*, 2 Kernan, 373.)

The affidavit made by John Wilnot, on the 20th of May, 1854, the third day after this arrangement between all the parties, affirms that the sale and delivery to Patterson were absolute, an express promise by Patterson, subsequent to the delivery, to pay on the 17th the full contract price, and a failure to perform his promise. That affidavit was made to procure an attachment against the property of Patterson. An attachment can be issued

only in an action for the recovery of money. (Code, § 227.) An affidavit which can authorize one to be issued, must show that a cause of action exists against the defendant. The cause of action stated in this affidavit, arose on contract, for goods sold and delivered to Patterson.

Without stopping to inquire whether the plaintiffs, after having instituted a proceeding to seize the property of one of the parties to this transaction, on an unqualified affidavit of an unconditional sale and delivery, are precluded from asserting the contrary, as a basis of different remedies, it is clear that the affidavit furnishes very strong evidence against the plaintiffs that the order of Patterson, as accepted by the defendants, was taken as a settlement of all claims of the former against the latter, except such as might justly be based upon the acceptance itself.

We think the defendants had a right to have the jury instructed in the terms of their fifth request, and that the instruction, that if Wilmot "did not intend to give up his claim, he is not bound," was erroneous. Some questions of minor importance, in relation to the admission of evidence, remain to be considered.

It is not apparent that the fact that the defendants had been in the habit of making advances to Patterson, or the fact that he had or had not made purchases from the plaintiffs prior to this, tended to throw any light upon the actual character of the transaction in question, or that they would authorize any inferences by the jury, in relation to the truth of the matters at issue, which they could not have made if no such facts had been proved. This evidence was received against the objection and exception of the defendants.

It is not easy to perceive on what principle its admission can be justified. The evidence being incompetent, and the defendants having excepted to its admission, an error was committed which entitles the defendants to a new trial.

Murray v. Smith, (1 Duer, 412,) was reversed by the Court of Appeals solely on that ground, although, in the opinion of the court, the evidence excepted to ought not to have influenced the verdict of the jury. When improper evidence has been given, and its reception was excepted to, the court will not, on a bill of exceptions, attempt to speculate as to its probable effect upon the conclusions of the jury, unless it can clearly see that it could not have had any influence upon them in forming their verdict.

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We do not see that we can say this evidence might not have prejudiced the defendants' case in the estimation of the jury.

The character of a witness on the part of the plaintiffs was thoroughly impeached, if credit is to be given to the impeaching witnesses. A supporting witness, who saw him for some six months, twelve years prior to the trial, and who had not seen him since then until within six months of the time of the trial, and who had "never heard him spoken of one way or the other," was allowed to testify that he considered him "a credible witness." To the admission of this evidence the defendants objected and excepted.

This decision cannot be sustained, unless it be a sound rule that a witness whose character is impeached may counteract the effect of the impeaching evidence by proof that, in the opinion of others who have but a slight acquaintance with him, and never heard him spoken of one way or the other, and who know nothing of his general character, he is a credible witness.

I presume no one holds the opinion that a witness can be impeached by the testimony of persons who really know nothing of his general character, and never heard him spoken of, that they do not consider him a credible witness. If such evidence is incompetent for the purpose of impeaching a witness, I think it equally so to sustain one who has been effectually impeached. In such cases, general character is the broadest form of inquiry admissible. Particular offences or vices cannot be proved or disproved.

The practical question is, has the witness such a want of moral character, taking the character which he has acquired among those who know it as the standard, that others cannot credit what he may say?

We think the evidence received to sustain the character of the impeached witness was improperly admitted, and that on that ground also the defendants are entitled to a new trial.

The verdict must be set aside, and a new trial ordered, with costs to abide the event.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE NANTUCKET
PACIFIC BANK, respondents *v.* HORATIO N. STEBBINS. THE
SAME *v.* THE SAME.

One Potter, of Massachusetts, and Stebbins, the defendant, on the 15th of August, 1854, exchanged notes, each giving to the other his two notes, of the same date and amount, and having the same time to run. Potter, holding the two notes received from the defendant, on the security of them and of other notes, amounting in all to \$11,956.04, procured the plaintiffs on the 23d of August, 1854, to discount his note of that date for \$8000, payable ten days thereafter. He failed to pay his \$8000 note. He was proceeded against as an insolvent, in Massachusetts, and on the 11th of October, 1854, Shaw & Swain were appointed trustees of his estate by a commission of insolvency, and he assigned his property to them as such trustees. When both of the said notes, so made by Stebbins, became due, and separate suits had been brought thereon, only \$3614.67 of the other collaterals had become due, and they had been paid. When the said two actions were tried, and they were tried together, all of the other collaterals had matured and produced enough to pay the note which the plaintiffs discounted for Potter, into the sum of \$196.11, including interest.

Held, that the plaintiffs were entitled to judgment in the actions on the notes made by Stebbins for the amount of the notes, with interest and the costs of the actions; that each note was a good consideration for the one exchanged for it; that at the time Potter conveyed his estate to Shaw & Swain, as trustees in the insolvency proceedings, the defendant could not have compelled the notes made by him to be set-off against those he received in exchange therefor; that any equities which Stebbins might have, could only be considered and determined in an action or proceeding, to which Potter, Shaw, and Swain were parties.

That an order or provision in the judgments, permitting him to be discharged therefrom on paying to the plaintiffs the balance due to them from Potter on the \$8000 note, and the costs of the two actions, and the residue of the moneys into court, to abide its further decision, on application for such moneys to be made either by Shaw & Swain, or by the defendant, on due personal notice to the other of the time and place of such application, secured to the defendant all the relief to which he was entitled in such actions on such a state of facts.

(Before DUER, BOSWORTH and WOODRUFF, J.J.)

December 13, 1856; February 14, 1857.

THESE actions came before the court on an appeal by the defendant from the judgment rendered in each of them. They were tried before Mr. Justice Duer, without a jury, on the 26th of December, 1855, and the appeals were argued together, the facts in each case being substantially the same.

The first action is on a note made by the defendant, dated the

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15th of August, 1854, and payable to the order of Thomas Potter, two months from its date, for \$1936.42; and indorsed by Potter to the plaintiffs. On the 7th of March, 1856, judgment was given for the plaintiffs for \$2120.54 damages, and \$136.28 costs.

The second action is on a note of the same date as the other, made by Stebbins to order of Potter, payable three months from its date, for \$2084.37, and indorsed by Potter to the plaintiffs. Judgment was given for the plaintiffs in this action, on the 7th of March, 1856, for \$2270.39 damages, and \$115.03 costs.

The plaintiffs are a Massachusetts corporation, doing business at Nantucket, in that state, and have power to receive, hold, and own promissory notes, etc.

On the 23d of August, 1854, the plaintiffs discounted for said Thomas Potter, of Nantucket, Massachusetts, his note for \$8000, dated on that day, and payable ten days after date, to the order of William Mitchell, cashier at the Leather Manufacturers' Bank in the city of New York.

To secure the payment of his note, and to induce its discount, Potter deposited with the plaintiffs the following notes and acceptances as collateral securities, viz.:

1	Note of E. W. Gardner, due Sept. 12 ₁₈ , 1854, for \$	924.00
2	" Horatio N. Stebbins, due Oct. 15 ₁₈ , "	1936.42
3	" Samuel Woodward, due Oct. 20 ₁₈ , "	1025.00
4	" Blow and March, due Nov. 1 ₁₈ , "	1665.67
5	" Horatio N. Stebbins, due Nov. 15 ₁₈ , "	2084.37
6	" Decker and Godine, due Nov. 24 ₁₈ , "	1320.58
7	Acceptance of W. & F. W. Whittemore, due Jan. 18 ₁₈ , 1855, for	1500.00
8	Acceptance of W. & F. W. Whittemore, due Jan. 22 ₁₈ , 1855, for	1500.00

The total amount of these collaterals was, \$11,956.04.

The notes Nos. 2 and 5, are the notes on which these suits are brought.

Potter failed to pay the note for \$8000 at its maturity.

On the 11th of October, 1854, an assignment of his property was made to John H. Shaw and Alanson Swain, by a commis-

sioner of insolvency, under the insolvent laws of the state of Massachusetts, the said Potter being insolvent.

All the above collaterals were paid on the days when they fell due, except Nos. 2 and 5, the notes of defendant, on which nothing has been paid.

Defendant's first note became due and was protested October 18, 1854. On that day only \$924 of the collaterals had come due, and only that sum had been paid on the \$8000 note.

Suit was brought on that note Nov. 3, 1854. On that day only \$1949 of the collaterals had become due, in addition to the note in question, and only that sum had been paid on the \$8000 note.

Defendant's second note came due and was protested Nov. 18, 1854. On that day only \$3614.67 of the collaterals had become due, besides the notes of the defendant, and only that sum had been paid on the \$8000 note.

Suit was brought on the second note, Nov. 25, 1854. On that day only \$3614.67 of the collaterals had become due, besides the notes of defendant, and only that sum had been paid on the \$8000 note.

On the 25th of Jan., 1855, after the last collateral was paid, there remained due to the plaintiffs the sum of \$183.23 on the \$8000 note, and that sum, with interest from that date, is still due thereon.

The two notes in suit were given by defendant to Potter in exchange for two notes of the same date, tenor and amount respectively, made by Potter to the order of Stebbins, and payable at the Leather Manufacturers' Bank in the city of New York.

These notes were not paid by Potter, and when they became due Potter failed to take them up. Defendant was the holder and owner of them at the time of the commencement of these actions. One of these notes, viz., the \$1936.42-100 note was indorsed by Stebbins, and he had it discounted, and received the money on it; and afterwards, on the day it became due, he paid the money and took it up, and has since been the holder of it. The other note, viz., the \$2084.37-100 note, was not used in any way by defendant, but held by him ever since it was made.

They were afterwards proved by the defendant before the Commissioners in Insolvency.

The exchange of notes between defendant and Potter was made in the city of New York.

This statement of facts was admitted to be true, but the right to object to proof of any of such facts and to their relevancy was reserved.

The defendant's counsel objected to the relevancy of such of the foregoing facts as related to the insolvency of Thomas Potter, or to the assignment of his property by a commission of insolvency under the insolvent laws of Massachusetts, or to the two notes of Thomas Potter held by defendant, having been proved by the defendant before the commissioner in insolvency.

The court overruled the objection, and the defendant's counsel excepted.

The said statement of facts and admission were there received in evidence.

The court made its decision on the 6th of March, 1856, and decided that, it appearing to the court as a conclusion of law upon the said facts, that if upon the said facts any equities arise in favor of the defendant, in respect to the note on which this suit is brought, such equities can only be considered in an action or proceeding in which the said Thomas Potter and his assignees are before the court; and it therefore appearing that the said facts constitute no defence to the plaintiffs' suit, but that the plaintiffs, either in their own right, or as trustees of the said Thomas Potter, and persons claiming through him, are entitled to recover from the defendant the whole amount of the said note with interest.

The court made an order, in each action, simultaneously with the decision thereon, that on perfecting judgment, an execution might be issued to collect the costs, but none should be issued to collect the damages short of thirty days.

That if within the thirty days, the defendant should pay the costs and sheriff's fees, if any, to the plaintiffs, and should also pay the damages with interest, into court, to abide its further order, and give notice thereof, the execution should be countermanded. If he failed to make such payment and give notice within the thirty days, execution might be issued forthwith for the whole judgment, and then the further provisions of the order should be of no effect.

It then further provided, that if the moneys were paid and no-

tice given within the thirty days, the plaintiffs, within thirty days thereafter, should serve on Potter, Shaw and Swain, in person, a copy of said order, and upon filing with the judgment record, proof of such service, by affidavit or admission, the plaintiffs should be discharged from all liability to Potter, Shaw and Swain, or to either of them, or to any person claiming under them for or on account of the notes, or either of them, or the proceeds thereof; that the defendant might apply to the court, at any Special Term, for the moneys so paid into court, upon petition, on proof of personal service of it, on Potter, Shaw and Swain, at least forty days before the time named for presenting it, if served out of the state, and at least twenty days if made in the state.

That Potter, Shaw, and Swain, or either of them, or any one claiming under them, might apply to the court at Special Term for the moneys so paid into court, on petition and due proof of personal service thereof on the defendant at least twenty days before the time named for presenting it.

The order in each action was in the same terms, except that the order in the first action permitted execution to be issued forthwith to recover not only the costs of that action but also \$196.11, parcel of the damages, being the balance, with interest, due to the plaintiffs from Potter, over and above the amount realized from the other collaterals, on the security of which his note for \$8000 had been discounted.

Judgment was entered in each action on the 7th of March, 1856, absolute and unconditional in its terms, for the recovery of the amount of the note and interest, with the costs of suit.

The defendant duly excepted to so much of the decision of the court, made in each action, as decides as conclusions of law :

That if upon the facts, any equities arise in favor of the defendant in respect to the note on which this suit is brought, such equities can only be considered in an action or proceeding in which the said Thomas Potter and his assignees are before the court, and that said facts constitute no defence to the plaintiffs' suit; but that the plaintiffs, either in their own right or as trustees of the said Thomas Potter, and persons claiming through him, are entitled to recover from the defendant the whole amount of said note with interest:

That the president, directors, and company of the Nantucket

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Pacific Bank, the plaintiffs, do recover of Horatio N. Stebbins, the defendant, the amount of the note and interest, besides costs and disbursements.

The defendant also excepted to so much of said decision, as found as facts, that on the 11th day of October, 1854, an assignment of his, (the said Thomas Potter,) property, was made to John H. Shaw and Alanson Swain, by a commissioner of insolvency, under the insolvent laws of the state of Massachusetts, the said Potter being insolvent; and that the two notes of Potter, held by defendant, were proved by the defendant before the commissioner in insolvency.

The defendant also excepted: that any testimony relative to the insolvency of, or assignment by said Thomas Potter, or to the proof of said notes before the commissioner, was irrelevant and inadmissible.

That the decision is contrary to law, and against the evidence.

The answer of the defendant stated that the two notes in question, with others, were transferred by Potter to the plaintiffs to secure his indebtedness to them; that they had realized enough from the other collaterals to pay them in full; the making of notes by Potter in exchange for those in suit; that they are owned by the defendant and unpaid; that after the exchange of notes between Potter and the defendant, Potter was proceeded against as an insolvent, in Massachusetts; that Shaw and Swain had been appointed therein trustees of his estate, and he had assigned his property to them as such trustees; that these suits were in truth prosecuted for the benefit of said Shaw and Swain, and set up as a counter-claim in either action the note made by Potter, and given to defendant in exchange for the note sued in such action, and prayed that the note made by Potter might be set-off against the corresponding note made by the defendant and delivered in exchange therefor, and that the note made by the defendant should be surrendered to him, and the complaint be dismissed, with costs.

F. Tillou, for defendant and appellant, made and argued the following points:—

I. The plaintiffs held the note as collateral security only, with other collaterals, to secure a loan by them to Thomas Potter. On

payment of Potter's indebtedness to them, all the surplus collaterals reverted to Potter as the party beneficially interested in them.

II. The plaintiffs have been paid all Potter's indebtedness to them, except \$183.23. All beyond that amount is prosecuted for the benefit of Potter, who is the party beneficially interested, and whom the plaintiffs represent as his agent; and the note set up in the answer is a good set-off beyond the \$183.23 and interest, and beyond this the plaintiffs are in precisely the same position that Potter would be were he the plaintiff. (Barbour on Set-off, p. 71, and authorities cited; *id.* p. 115 to 129, and authorities; 2 R. S. 4th Ed. 354, § 12, sub. 7; *Coppin v. Craig*, 7 Taunton, 243; *Hawkins v. Whittin*, 10 Barn. & Cress. 217; *Dixon v. Cass*, 1 Barn. & Adolph. 343.) (a.) The plaintiffs, nor Potter's assignee in insolvency, can claim any better or superior equities than Potter himself could.

III. The question of the insolvency of Potter, under the laws of Massachusetts, or any proceedings thereunder, is immaterial and cannot arise in this case, to the prejudice of Stebbins' defence or set-off. (*Hoyt v. Thompson*, 1 Selden, 320; *Hoyt v. Thompson*, pr. Paige, J., p. 350, 351; Barbour on Set-off, p. 115 to 129.) (a.) The defendant objected to the testimony of such insolvency.

IV. The statutory insolvent proceedings against Potter, in Massachusetts, whereby his property was assigned to a commissioner in bankruptcy, under the insolvent laws of Massachusetts, did not operate to transfer the debt due by the appellant Stebbins, a resident of this state, as maker of the note in suit, or so as to prejudice or affect his right of set-off or counter-claim, or other defence as against Potter. And the foreign assignees of Potter stand in precisely the same position as against Stebbins, that Potter himself would, if there had been no insolvent proceedings had against him. (*Hoyt v. Thompson*, 1 Selden, p. 320; *Hoyt v. Thompson*, pr. Paige, J., p. 350 and 351, and authorities cited; *Abraham v. Plestero*, 3 Wend. 538; *Johnson v. Hunt*, 23 Wend. 89; *Willett, president v. Waite*, 12 Howard Sp. T. R. p. 34.)

V. So long as Stebbins held the note of Potter before his insolvency or bankruptcy, it can be set-off against the note in suit. (Barbour on Set-off, 115 to 129; *ex parte* Hall Co. Bank Laws, 553; *Root v. Taylor*, 20 John. 137; *Smith v. Brinckerhoff*, 8 Bar-

bour, 519, affirmed; 2 Selden, 388; *Hancock v. Entwistle*, 3 Term. R. 435; *Coppin v. Craig*, 7 Taunton, 243; *Collier v. Jones*, 10 Barn. & Cress. 777; *Dixon v. Evans*, 6 Term R. p. 57.) (a.) That Stebins did so hold the note.

VI. The judgment was against law, and should be reversed, with costs.

VII. The stay of proceedings under the order should be extended, so as to preserve the rights of the appellant, in case he should deem it advisable to appeal from the further judgment of this court.

West & Glover, for respondents.

BY THE COURT. BOSWORTH, J.—The note, on which the first action was brought, matured on the 18th of October, 1854. That on which the second action was brought, matured on the 18th of November, 1854. The first action was commenced on the 3d of November, and the second on the 25th of November, 1854.

On the 23d of August, 1854, the plaintiffs discounted for Thomas Potter his note of that date, for \$8000, payable ten days after its date, on the deposit of the two notes in suit, with others, as collateral security. When the second action was commenced, the amount due to the plaintiffs, on the \$8000 note, exceeded the aggregate of the two notes in suit.

Thomas Potter was a citizen of Massachusetts. On the 10th of October, 1854, before either of the two notes in suit had become due, Potter being insolvent, an assignment of his property was made to John H. Shaw and Alanson Swain, by a commissioner of insolvency, under the insolvent laws of the state of Massachusetts. The effect of such an assignment, according to those laws, is not stated in the case, nor are the laws themselves referred to. The fact that such an assignment was made is alleged in the defendant's answer, and was admitted on the trial. It was also admitted that the defendant proved, before the commissioners in insolvency, the notes made by Potter and given to the defendant in exchange for the two in suit. The admissibility of proof of these facts was objected to by the defendant, but not the nature or sufficiency of the proof.

The assignment must be deemed effectual to transfer to the as-

signees, Shaw & Swain, all the right, title, and interest of Potter, to the notes in suit. That gave them a right to claim of the plaintiffs the surplus of the collaterals over and above the amount necessary to satisfy the \$8000 note.

If the present defendant had instituted an action on the 10th of October, 1854, against Potter and the plaintiffs, before the assignment to Shaw and Swain, to compel a set-off of one set of notes against the other, it would have been of no avail. The plaintiff would have had a right to have the amount of the two notes then applied towards the payment of the \$8000 note. Neither the notes made by the defendant, nor those made by Potter, were due when that assignment was made. The note of \$1936 $\frac{1}{2}$, made by Potter, had been discounted for the defendant, and from that time until he took it up, on the day of its maturity, he was not the owner of it. The notes made by the defendant cannot be set-off against those made by Potter, under the Revised Statutes, in relation to set-offs, because neither of the notes was due at the time of Potter's assignment in insolvency.

Courts of equity follow the law in regard to matters of set-off, unless there is some intervening natural equity going beyond the statutes of set-off, which constitute the general basis of set-off at law. (*Howe, et al. v. Shephard*, 2 Sum. 412; *Gordon v. Lewis, et al.* ib. 633-634.)

It is also a general rule, that one of two persons indebted to each other, may file a bill to compel a set-off, if the debt owing to himself is due, though the one owing by himself is not due, if the other party is insolvent; but he cannot do so before the debt owing to himself is due. (*Keep v. Lord*, 2 Duer, 78; *Bradley v. Angel*, 3 Coms. 475.)

But that rule is applicable only to the parties themselves, when no rights of third parties have intervened. That is not this case.

If Potter had owned the notes in suit when they matured, and had then been insolvent, it may be true that the present defendant could have maintained an action to compel a set-off of the one set against the other. But this case does not present any such question. There is no allegation in the answer, that there was any expectation or agreement that one note should be set-off against the other, or that Potter should pay at maturity the notes made by Stebbins. The inference, from the allegations of the an-

swer, as well as from the facts found by the court, is that it was expected each party would pay the notes made by himself, and that the notes of the one were the consideration given for those of the other.

I think it quite apparent, that the legal and equitable rights of the defendant upon the facts, as they existed at the time of the trial, depend upon the effect of the insolvent proceedings in Massachusetts, and upon the effect, also, of the act of the defendant, in proving before the Commissioners in Insolvency, the two notes made by Potter.

Shaw and Swain are necessary parties to any proceedings which may be had to determine those rights.

The utmost relief to which the defendant is entitled, is exemption from liability to the plaintiffs, on paying to them \$196¹¹/₁₀₀, and their costs in both actions, with interest, and the residue of the judgments into court to abide its further order. That relief the court, at Special Term, intended to secure, by the order dated one day prior to the judgment. Such further order will be made when the relating rights of the defendant and of Shaw & Swain to such residue have been determined by an action to which they are all parties, or otherwise. The judgment in the first action should be modified so as to secure to the defendant an opportunity to claim the relief to which he may show himself entitled, by adding to it these words, viz., "And it is further adjudged, that this judgment may be satisfied, and, also, all liability of the defendant to the plaintiffs by reason thereof, on payment, by the defendant to the plaintiffs, or to their attorneys, within thirty days, of the two sums of \$196¹¹/₁₀₀ and of \$136²⁸/₁₀₀, with the interest thereon, and the costs of this appeal and the residue of said judgment, with interest thereon, into the United States Life Insurance and Trust Company, to the credit of this action, to abide the further order of the court, upon a final determination of the rights of the defendant, and of John H. Shaw and Alanson Swain, assignees of Thomas Potter, under insolvent proceedings in the state of Massachusetts, or of their successors in office, in respect to such residue.

"It is further adjudged that, in order to determine the right to such moneys, the defendant may apply to this court, at Special Term, by petition, for an order that they be paid to him, on due proof of service of a copy of said petition, and of notice of the

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time of presenting the same upon the said plaintiff, and the said Potter, and the said Shaw and Swain, or the successor in office of said Shaw and Swain, such service to be made at least forty days before the day designated for presenting the said petition; a copy of this judgment to be served on each of said persons, together with the said petition and notice."

In the second action, the sum to be paid to the plaintiffs, or their attorneys, is \$115⁶³/₁₀₀, with interest, and the costs of the appeal. The residue of the judgment, with interest, to be deposited. And the judgment in the second action will be modified accordingly, by adding to it the provisions directed to be added to the judgment in the first action.

In other respects, the judgments must be affirmed, with costs.

GEORGE M. PRALL v. GEORGE W. HINCHMAN.

No action can be maintained against the indorser of a promissory note by indorsees in whose hands it was placed for a special purpose, when it appears that to their knowledge the purpose for which it was delivered to them had wholly failed, and that it was their duty to have returned the note to the party from whom they had received it.

The objection in such a case to a recovery is equally fatal, whether the suit is brought in the names of the indorsees or in that of a nominal plaintiff for their benefit.

Held, that as it clearly appeared from the evidence in this case, that the plaintiff had paid no value for the note, had not retained its possession, and had not directed the suit to be commenced, he could not be regarded as a *bona fide* holder, and not being the real party in interest, had no right under the Code, to maintain the action.

Held, that one of the original indorsees was properly rejected as a witness on behalf of the plaintiff, upon the ground that it was for the immediate benefit of himself and his partners that the suit was prosecuted.

The question, whether the suit is prosecuted for the immediate benefit of a witness offered on the part of the plaintiff, is a question of law which it belongs to the court alone to determine.

Hence, all the evidence bearing on the question must be addressed to the court, and when other witnesses are examined, to prove the incompetency of the witness, as having an immediate interest, he cannot be examined to contradict them by proving his own competency. He is no more competent for this purpose than to testify to the merits of the case.

Order denying a new trial affirmed, with costs.

(Before DUNK, BOSWORTH and WOODRUFF, J.J.)

Dec. 15, 1856; Feb. 14, 1857.

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APPEAL by the plaintiff from an order, at Special Term, denying a new trial, upon a case and exceptions.

The action was by the plaintiff as indorsee, against the defendant, as the indorser of a promissory note for \$1198.86, made by Young and Ward, and payable to his order.

The cause was tried before Duer, J., and a jury, in October, 1856, and upon the evidence given, and the motion of the defendant's counsel, the Judge dismissed the complaint. The plaintiff's counsel excepted to the decision.

The substance of the pleadings, the evidence given, and the exceptions taken on the trial, and the questions of law argued by the counsel on the hearing, are all fully stated in the opinion of the court.

J. C. Dimmick, for the plaintiff, contended that the complaint ought not to have been dismissed, and that the order denying a new trial ought, therefore, to be reversed. He cited *Gage v. Kendall* (15 Wend. 640); *Gurney v. Barnes* (25 Wend. 411); Code, § 113.

James T. Brady, for the defendant, cited *Foot v. Collins*, (21 Wend. 109,) and *James v. Archer*, (22 Wend. 480,) to prove that a Judge has power to nonsuit after evidence has been given on both sides, and he cited *Rudd v. Davis*, (3 Hill, 287, affirmed; 7 Hill, 529,) to prove that to warrant a nonsuit in such a case, it is not necessary that the evidence for the defence should be conclusive. It is enough that a verdict for the plaintiff would be set aside, as against the weight of evidence. The counsel then insisted, upon a review of the whole evidence, that it established completely the defence set up in the answer, and that the Judge, upon the trial, could not do otherwise than dismiss the complaint, or direct the jury to find a verdict for the defendant.

BY THE COURT. WOODRUFF, J.—The complaint in this action is founded upon a promissory note made by the firm of Young & Ward, payable to the order of, and indorsed by the defendant; and, in making title to the note, the plaintiff avers no other indorsement, but professes to derive title directly from the plaintiff, and through his indorsement only; thus, he avers "that the said note

was by the said defendant, George W. Hinchman, indorsed in blank and delivered to the plaintiff."

The answer sets up as a defence, that the note was indorsed by the defendant without consideration for the accommodation of the makers, for a special purpose, and upon the express understanding that it should not be used unless the makers, (who were then embarrassed,) succeeded in procuring an extension of credit from all their creditors, in which event, the note was designed to be used as a security to the firm of Young, Bonnell & Sutphen, creditors of the makers; that although the note was left in the hands of one of the members of the firm of Young, Bonnell & Sutphen, they had knowledge of the condition upon which the defendants indorsed the note, and that the makers failed to procure the contemplated extension. That the plaintiff is not the lawful holder and owner of the note; that if any transfer has been made to him, such transfer was without consideration, and that the note is still the property of Young, Bonnell & Sutphen, for whose benefit this suit is prosecuted. Other matters are set up in the answer, but they are not material to this appeal.

On the trial, the plaintiff having read the note in evidence, and proved protest and notice to the defendant, it was shown on the part of the defendant, by the testimony of one of the makers of the note, that the note was indorsed by the defendant for the accommodation of the makers; that the makers were at the time engaged in an endeavor to procure an extension from their creditors; that Young, Bonnell & Sutphen would not consent to such extension unless indorsed notes were given them; that the defendant's indorsements upon this and other notes were for that reason procured; but the indorsements were given upon an agreement that the notes should not be used at all unless the extension was obtained, and the defendant was particular in requiring that the notes should not go out of the maker's hands. Sutphen of the firm of Young, Bonnell & Sutphen, was informed of the transaction, and of the condition upon which the indorsement was given. Pending the negotiations with the creditors, the notes were delivered to Sutphen, but, although meetings of the creditors were had, the efforts of the makers to procure an extension failed; and the witness stated that "the reason why he did not demand the notes after the extension fell through, was negligence."

To this evidence there was no contradiction. Indeed, upon this branch of the case no other witness was examined.

It is, therefore, obvious that Young, Bonnell & Sutphen had acquired no title to the notes as against the defendant. The note was indorsed by the defendant for a special purpose, indorsed without consideration, and was not to be used except in a contingency which never happened, and of all this, Young, Bonnell & Sutphen had notice before the note was placed in their hands. They could not recover thereon against the defendant.

The defendant, then, in order more fully to impeach the plaintiff's title, read in evidence the deposition of the plaintiff himself, taken, *de bene esse*, in this cause, in which he testified, that upon a certain occasion before the note became due, Mr. Young, (of the firm of Young, Bonnell & Sutphen,) being at dinner with the plaintiff at his house in Jersey City, proposed to him to purchase the note now in question, and that he (the plaintiff) "told him if their names (Young, Bonnell & Sutphen) were on it, he would give \$1000 for it." That before he left he (Young) said that plaintiff could have it, and left the note with him; but at that time the names of Young, Bonnell & Sutphen were not on it.

If the transaction had terminated here, so far as the bargain was to be judged of, it is possible that a payment or tender of the \$1000 would have entitled the plaintiff to retain the note, though not indorsed by Young, Bonnell & Sutphen, and, perhaps, he would have had a right to demand the indorsement of that firm in fulfilment of the apparent agreement of Young, implied in the facts stated; and, perhaps, he might if he chose waive their indorsement, and insist upon retaining the note on paying the \$1000. But the parties did not stop here; within a day or two after the above conversation, Young, Bonnell & Sutphen sent for the note, and the plaintiff returned it to them; and he testified that he never saw it afterwards, and he does not know who gave directions to sue it, and he has paid no costs of protest, nor lawyer's fees.

Besides this, he testifies that at the time of the above conversation with Young, he had in the hands of Young, Bonnell & Sutphen over \$1000, all of which he subsequently drew out, and that the account between them is, he thinks, closed.

It is true that he says he was told by "the bookkeeper," "it

might have been three or four months after the conversation," and of course long after the note became due, that Young, Bonnell & Sutphen had charged him with \$1000; but he does not say that he ever assented to the charge, nor that the note with Young, Bonnell & Sutphen's indorsement thereon was ever delivered to him or placed in any manner at his disposal, nor that he ever consented to buy it, or did buy it, without such indorsement. The extent of his further evidence on the subject is this: "Mr. Young once asked me what he should do with it, and I told him to put it through."

It is quite apparent, from this state of the proofs, that the title to this note never passed out of Young, Bonnell & Sutphen. At no moment have they been in a position to compel him to pay the \$1000, and he has neither accepted any transfer of the note to himself nor had any actual possession or control of the note since he voluntarily returned it to them, and so far from having paid value therefor, he has withdrawn from their hands the money they held, and, as he understands it, closed his account with them.

It is not material to go further, or indulge in merely probable inferences; if it were, it would appear in no slight degree probable that Young, Bonnell & Sutphen never did indorse the note until after this suit was brought, and after the *de bene esse* examination of the plaintiff himself, when it appeared material that they should do so in order to exhibit an apparent performance of the understanding with Young, to which the plaintiff had testified, in which defendant's offer to give \$1000 for the note was on the condition that they would indorse it. This probability is made very strong by the fact that the complaint sets out no such indorsement, but avers title in the plaintiff by direct indorsement to himself by the defendant. It is hardly probable that the plaintiff, having made it one of the conditions of his purchase that Young, Bonnell & Sutphen should indorse the note, would consent, when a suit became necessary, and his recovery was placed in doubt, to strike out their indorsement on the trial. But it is needless to found any thing upon this possible or probable state of the case.

It is plain, upon the plaintiff's own testimony, that he had no title to the note, nor any possession or control over it, unless the mere fact that Young, Bonnell & Sutphen had caused a suit to be

brought thereon in his name is sufficient to overcome the inferences from his own testimony.

But it is argued that the plaintiff, by his attorney, having produced the note on the trial, indorsed in blank, shows a legal title in himself, and the possession of the note on the trial not being shown, as between him and Young, Bonnell & Sutphen, to be *mala fide*, the defendant can suffer no prejudice, because a recovery by the plaintiff will operate as an effective bar to any other suit in whose name soever brought.

Two answers suggest themselves: *First*, the defendant has shown, without contradiction, a state of facts which make it unjust that he should pay, and under which he is not legally liable to pay this note to any one, except he be a *bona fide* holder for value, without notice of the conditions of his indorsement; the plaintiff is not such a holder. And, *second*, the Code requires that the suit shall be brought in the name of the real party in interest. The act of Young, Bonnell & Sutphen, in placing the note in the hands of an attorney, to be sued in his name, when he had no title to the note, and had parted with no value therefor, and when they had no right of action thereon, did not *prima facie*, at least, make him the real party in interest.

We have no hesitation in saying that, upon the proofs as given, the suit was *prima facie* brought by Young, Bonnell & Sutphen, for their own benefit, and that the use of the plaintiff's name (he being the brother-in-law of one of them) was a mere artifice, by which they sought to compel the defendant to pay the note, which they had no right, either legal or equitable, to enforce.

Under such circumstances we are clear that a verdict for the plaintiff would have been against evidence, and that the Judge, therefore, committed no error in ordering the complaint to be dismissed, if no evidence offered by the plaintiff was improperly rejected, nor any was received from the defendant which was legally inadmissible.

Several exceptions were taken on the trial by the plaintiff's counsel. Our attention was called to one only, either by the points of counsel or by his argument of the appeal. The others were not claimed to have been well taken, and have probably no foundation.

The plaintiff's counsel did, however, suggest that the Judge

erred in not permitting Sutphen to testify on behalf of the nominal plaintiff, and he insists that if he had been permitted to testify he might have stated facts which the plaintiff either did not know or which he had omitted to state, which, if true, would show either that the plaintiff was a *bona fide* holder for value, or that the witness's firm held the note under circumstances which would entitle them to recover, had the suit been in their name.

The witness was rejected, upon the ground that he was one of the parties for whose immediate benefit the suit was brought. It is apparent, then, that even if it be assumed that he could have testified to facts showing Young, Bonnell & Sutphen's original right to enforce the note, that evidence would not obviate the objection. It still appeared *prima facie* established that the suit was brought for their benefit.

It was rather a bold offer, to show by Sutphen that the plaintiff was a *bona fide* holder for value, or the legal owner in any sense, in opposition to the testimony of the plaintiff under oath, or when the plaintiff was not himself aware of any facts constituting him such owner. But it is not, perhaps, for that reason to be condemned, unless it be true that when a plaintiff (examined as a witness by the adverse party) makes admissions which show he is not the real party in interest, he is concluded thereby.

But the ruling was, we think, right upon this ground: as the case stood, it was *prima facie* established that the suit was prosecuted for the immediate benefit of the witness and his copartners. In that state of the proofs, the court were to decide whether he was a competent witness. The decision of that question is, of course, always a question for the court, and none the less so because it involves the very question in issue, or upon which the jury are to pass. (*Schapp v. Scadietzky*, 1 Abbott, 366; *Doe v. Davis, et al.*, 10 Ad. & El. N. S. 314.)

When a witness is called, the adverse party may either examine him preliminarily, or examine other witnesses to show that his interest is such as to render him incompetent; and if the fact be established, the court must reject him. If the proof be by other witnesses, the witness so called cannot be examined to contradict them, or prove his own competency. He is no more competent for this purpose than he is to testify to the merits of the cause.

The Code, in providing (§ 398) that no person shall be excluded

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by reason of his interest, adds expressly, (§ 399,) that this shall not apply to one for whose immediate benefit the suit is prosecuted.

The witness, when called, stood before the court, *prima facie*, in the condition described in this exception, and was, therefore, *prima facie* incompetent. Had the plaintiff called other witnesses, and shown that the witness had no interest, or that the witness had assigned or released all his interest before suit was brought, he might then have been examined.

We think there was no error in rejecting him when offered.

The order appealed from must be affirmed, with costs.

CHARLES F. WEBER and CARL GRASEMAN v. GEORGE R. SAMPSON and LEWIS W. TAPPAN.

This action was brought by the plaintiffs to recover their commissions, as brokers, for procuring a charter-party for a ship on a voyage from Calcutta to London. The defendants held the legal title to the ship, but held it as mortgagees, and were not in possession. The charter-party was not signed by them, and there was no proof that the person by whom it was signed, and who employed the plaintiffs, acted by their authority, or that they had ratified his acts.

Held, that, under these circumstances, the defendants were not liable for the commissions claimed, and that the complaint was properly dismissed. A mortgagee of a ship, if he is not in possession, although the legal title may be vested in him, and the ship be registered in his name, is not liable, as owner, for supplies furnished, or services rendered, to the ship. To render him liable an express contract is necessary.

Judgment for the defendants affirmed, with costs.

(Before HOFFMAN and SLOSSON, J.J.)

January 9; February 14, 1857.

APPEAL from a judgment, in favor of the defendants, dismissing the complaint with costs.

The cause was tried before Chief-Justice Oakley, and a jury. The plaintiffs having rested, the defendants moved for a dismissal of the complaint. The plaintiffs then offered to produce some further evidence, which is hereafter noticed. The Judge held, that the testimony, including what was offered and treated as proven, could not sustain the plaintiffs' claim, and granted the motion to dismiss the action. To this the plaintiffs excepted.

A motion for a new trial was heard at Special Term, before Mr. Justice Bosworth, and the same was denied, and final judgment was entered. From this the appeal is taken.

The facts are sufficiently stated in the opinion of the court.

J. Owen, for the plaintiffs and appellants.

J. C. Carter, for the defendants and respondents.

BY THE COURT. HOFFMAN, J.—The action is brought to recover from the defendants the amount of commission alleged to be due to the plaintiffs, as brokers, for procuring a charter for the ship *Rockland*. The allegation is, that the defendants were owners of the vessel, or trustees holding the legal title, or mortgagees in possession, and in law liable as owners; that Horace B. Tibbetts, as their agent, employed the plaintiffs; that they effected the charter, and were to receive five per cent. commission.

The charter-party produced in evidence, is dated New York, February 12, 1851, and is between H. B. Tibbetts of New York, part owner and agent of the good ship *Rockland*, and Messrs. Ewbank and Gray, of London, merchants. It describes the vessel as now in the berth in New York, for San Francisco, California, and stipulates that she shall, with all convenient speed, sail and proceed from California to Calcutta in the East Indies.

The plaintiffs allege that the said Tibbetts had full power to bind the ship and her owners by the terms of the charter-party. The vessel was to proceed from Calcutta to Europe, to be addressed to Graseman & Co., London; and it was declared in the charter-party, that a commission of five per cent. on the gross amount of freight of such charter was then due to the said firm. The plaintiffs compose it.

It appears that one Platenius acted as agent, and on behalf of the plaintiffs, in the transaction.

From this statement, it is obvious that the liability of the defendants must depend either upon such an ownership or interest, as of itself will render them presumptively responsible, or an express undertaking to be so contracted by themselves, or through an agent sufficiently authorized.

The evidence establishes that Tibbetts was originally the full

owner of the vessel, the enrollment of which was issued on the 28th of January, 1851, in New York. On the 28th of January, he executed a bill of sale of such vessel to the defendants, a firm at Boston, in the usual form of a transfer, except in the following clause: "To have and to hold the said ship, etc., unto them the said Sampson and Tappan, as trustees, their executors and assigns, to the sole and proper use, benefit, and behoof of them, the said Sampson and Tappan, as trustees, their executors and assigns for ever."

On the 30th of January, 1851, George R. Sampson, one of the defendants, made "the oath of ownership, swearing that he and Lewis W. Tappan were co-partners, and were the true and only owners of the said ship or vessel, called the Rockland.

Upon this, the usual register was granted to the defendants, dated the 3d of February, 1851. The register issued in January was cancelled, property changed.

In April, 1851, the master took command of the ship in the port of New York, having been employed by the defendants for a voyage to San Francisco. She proceeded to that place, thence to Calcutta, where a cargo was taken in, with which she came to Boston.

At Calcutta an agent of Ewbank & Gray applied to the master, offering to supply a cargo, under the charter-party, for London. The master informed him that he had nothing to do with it, and should not recognize it.

The plaintiffs' counsel produced, in evidence, a letter from the defendants, dated April 25th, 1851, in which they say that "they had nothing to do with the ship, beyond a certain advance made Mr. Tibbetts on her."

After the motion for a nonsuit, the plaintiffs offered to prove as follows:—

That at the date of the charter-party, and before and afterwards, until the vessel sailed for San Francisco, she was managed in New York by H. B. Tibbetts; that by his instructions she was employed to go to San Francisco; that he engaged freight and supplies, and equipment; that these acts were recognized by Sampson and Tappan, who paid the bills of such goods as were supplied in New York by Tibbetts.

Upon the testimony produced by the plaintiffs, it is rendered

clear that the defendants were in fact mortgagees of the vessel, and took possession of her about the beginning of April, 1851. The voyage to Calcutta and back appears to have been for their benefit, and under their control.

It is well settled that a mortgagee of a vessel not in possession, is not responsible for wages, repairs or supplies, in the absence of any express contract under which his credit is relied upon. (*King v. Franklin*, 2 Hall, Sup. Ct. Rep. 1; *Birbeck v. Tucker*, 2 Hall, 121; *Brooks v. Boudsay*, 17 Rich. 441; *McCartee v. Huntingdon*, 15 Johnson, 298; *Hesheth v. Stevens*, 7 Barbour, S. Ct. Rep. 488; *Milne v. Spinola*, 4 Hill, 177.)

The case of *King v. Franklin*, in this court, bears a close resemblance in its facts to the present. Had the question been a liability for supplies or repairs, it would be decisive.

But the question here cannot be entirely controlled by this rule. On the 12th of February, 1851, when the charter-party was executed, Tibbetts was the mortgagor in possession. The defendants had a bill of sale of the 28th of January, not even absolute, but upon certain trusts, and these were undoubtedly the security of their advances. They had taken the usual oath of ownership, and changed the registry of the vessel, but these circumstances all existed in *King v. Franklin*, and were all held insufficient to vary the actual legal relations of mortgagor and mortgagee established by the evidence.

There are other legal relations between a mortgagor and mortgagee of a vessel, which bear upon this question.

By an English statute, (6 Geo. 4, C. 110, § 45,) the party taking a transfer of a vessel by way of mortgage, is to be noted as such by an entry in the book of registry, expressing that he holds her as security. He is then not to be deemed the owner of the ship any more than if a transfer had not been made, except so far as may be necessary for the purpose of rendering the vessel available for sale or otherwise, for the payment of the debt.

In *Dean v. McGhie*, (4 Bingham, 45,) a mortgagee got into possession of the ship immediately upon her return from a voyage, and claimed the freight of the goods on board. It was held that he was entitled to it as against the assignees in bankruptcy of the mortgagor. The right to growing freight passes with the ship.

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In *Kersevell v. Bishop*, (2 Crampton & Jervis, 529, and 2 Tyrwhit's Rep. 603,) the mortgagor had fitted out the vessel after the mortgage, and she returned from her voyage with a cargo on board. The mortgagee took possession when she was in the harbor, but before getting into dock. It was held that the mortgagee was entitled to the freight remaining unpaid.

In *Morison v. Parsons*, (2 Taunton, 407,) which was before the statute, the owner had chartered a vessel and then assigned her. He afterwards assigned the charter-party to a third person. It was held that the assignee of the ship was entitled to the freight earned subsequently to the assignment.

Chinnery v. Blackbrim, (1 H. Black. 117,) may probably be overruled, or materially affected by the later cases I have cited. But the observation of Lord Mansfield remains still the general rule, that "until the mortgagee takes possession, the mortgagor is owner to all the world, and entitled to the profits."

The act of Congress, of July 29th, 1850, appears to have been complied with. The bill of sale was deposited in the office of the collector in New York, and the new register issued.

It must be conceded upon the facts stated, and the cases cited, that the charter-party in question was valid against every one except the defendants, the mortgagees. But I do not see how the conclusion can be avoided, that when they chose to assert their rights of ownership, they could supersede a charter-party.

It is difficult to distinguish such a case from the common one of a mortgagee of real estate. A lessee put into possession after a mortgage could be ejected. Although our statute has prohibited the action of ejectment in such a case, yet upon a sale under a decree of foreclosure, the same right to avoid such a lease would arise.

Yet if this be the strict right of the mortgagee, I apprehend much less testimony should be required to prove his sanction to a charter-party made by a mortgagor, than when the question relates to the power of a mere stranger as an agent.

We find in this case, that the plaintiffs, through Platenius, their agent, were apprised in the charter-party itself that Tibbetts was not acting on his own account merely. He is described as part owner and agent. They were bound to know his true position, and the extent of his agency, or they relied upon his responsibility alone.

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The evidence shows merely the employment of Tibbetts, after the master of the defendants took possession, to supply the vessel and fit her out, and the master was always to consult him. It is manifestly insufficient to show any ratification or recognition.

From what took place at Calcutta, as deposed to by the master, it is plain that the defendants, if they knew of the charter-party, repudiated it.

The facts which we are to assume would have been proved under the offer, would establish a management and agency in New York of the vessel until she sailed; that by his instructions she was employed to go to San Francisco; that he engaged freight and supplies, and the equipment; and that these acts were recognized by the defendants, who paid the bills of such goods as were bought in New York by Tibbetts.

Put all this in the strongest language in a power of attorney, and it would still be impossible to hold, that it could establish either a ratification of a charter-party to commence in Calcutta and terminate in England, or an authority to enter into such a charter-party.

Admitting that the powers of a ship-husband would sanction a charter-party like this, or one which should transfer the entire ownership and control for the voyage, the case falls short of proving that Tibbetts occupied that position, or was clothed with such extensive powers.

The judgment must be affirmed, with costs.

JOHN F. WALTER v. JEHIAL T. J. POST.

Upon the trial of an action to recover the damages alleged to have been sustained by the plaintiff from certain wrongful acts of the defendant, although no express agreement or consent of the parties to the commission of the acts be proved, the jury has the right to infer the existence of such an agreement or consent from the acts of the parties and other circumstances.

So where it is proved to the satisfaction of the jury that the plaintiff actually consented to the acts for which, as trespasses, he claims damages, he ought not to be allowed to recover.

And a consent operates as a license, and a license is, in all cases, a justification of a trespass.

As a license is not required to be in writing, it may, in all cases, be proved by parol,

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either by showing its express words, or by proof of facts and circumstances from which the jury may infer its existence.

Held, therefore, that the Judge erred, upon the trial of this cause, in refusing to instruct the jury as requested, "that it was not necessary for the defendant to prove an express consent of the plaintiff for him (the defendant) to take down and remove the old division-wall, but that his consent might be inferred from his acts, and that if the jury believed that he did consent to these acts of the defendant, he cannot recover any damages therefor," and that the Judge also erred in charging the jury that, "unless the defendant had proved a clear and express consent on the part of the plaintiff that the defendant might remove the wall, he was not precluded from recovering any damages resulting to him therefrom."

Held, also, that the further instruction given by the Judge to the jury, "that if the plaintiff merely submitted to the taking down of the wall from an erroneous opinion that the defendant had a right to remove it, his submission would be no bar to the action," if not clearly erroneous, was calculated to mislead the jury.

There are many cases in which such a submission to the acts of a person who is acting not wilfully, but is doing what he believes he has a right to do, would be justly construed as an acquiescence that would preclude the plaintiff from asserting his own ignorance of his legal rights to the prejudice of a defendant equally ignorant, and relying in good faith upon the silent submission of the plaintiff as sanctioning his acts.

In such cases it may be justly held, that the submission of the plaintiff operates as a license, the validity of which he is estopped from denying.

In an action to recover damages for the injuries to the business of the plaintiff from a wrongful act of the defendant, the loss of profits, if a direct consequence of the wrong, may be included in an estimate of the damages that the plaintiff is entitled to recover.

New trial ordered; costs to abide event.

(Before DUEB, BOSWORTH and WOODRUFF, J.J.)

December 8, 1856; February 28, 1857.

APPEAL by defendant from a judgment for the plaintiff upon a verdict in his favor.

The action was brought to recover the damages that the plaintiff alleged he had sustained from certain wrongful acts of the defendant. The principal defence was, that the plaintiff had consented to the acts of which he complained.

The cause was tried before Bosworth, J., and a jury.

The nature and grounds of the action and of the defence sufficiently appear in the following statement of the pleadings:

The complaint alleges that the plaintiff is the lessee of a house and premises in the city of New York, for the term of eight years from the 1st day of May, A. D., 1852, and that since this date he has used and occupied, and still uses and occupies the first floor

as a merchant tailor's store, and that he also used and occupied during the same period the yard and rear part of the said premises, and has hired and rented the basement to other persons who used and occupied them for various purposes.

It then alleged, that on or about the 15th of June, 1854, the defendant, by himself and his agents, workmen, etc., etc., broke down and destroyed the southerly wall of the building, inserted beams into the house, and dug up the earth in the yard and carried away portions thereof, and built a wall upon the premises; entered the wall of the house and into the basement, and did various other injuries which it is unnecessary here to state in detail, and did thereby greatly obstruct the ingress and egress of the plaintiff's customers, and did prevent many customers from entering, and did compel the plaintiff to abandon his residence in the said house, and subjected him to various and heavy expenses, and continued in the commission of the said trespasses for three months, from, etc., etc.

That the plaintiff had been thereby deprived of the use of his house, etc., for the period of three months, and had lost and been deprived of sums of money due for the rent of divers portions of the premises, and the goods, etc., were much injured by dust and exposure; the plaintiff's trade was injured, his profits diminished, etc., etc., to his damage \$5000.

The answer of the defendant sets up title in the adjoining lot; the defendant's arrangements and contracts for building thereon; the discovery, on the removal of the defendant's old building, that the foundation wall was one half upon each lot, so that below the surface it supported the walls of both buildings; that, on notice to the plaintiff, and a proposal by the defendant that he would remove the old wall and erect a new wall upon the lot occupied by the plaintiff sufficient to support the plaintiff's building, and would also restore the basement of the plaintiff's house to its original condition within a reasonable time, and in the mean time would shore up and sustain the plaintiff's said building, the plaintiff expressed his satisfaction, and desired that the same be done as soon as practicable. It then averred the careful and proper performance of the work at large expense, and claims that as it was done at the plaintiff's request, when, (as averred) it was his duty to do the same himself, he was justly indebted to the defendant

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therefor. In relation to the excavation of the yard, the answer averred notice to the plaintiff, and claimed that it was his duty to support the earth and prevent its falling into the excavation there made on the defendant's lot only; his neglect to do so; that the earth in consequence fell in and upon the defendant's lot, to his damage, etc. That as to the basement, the injury, if any, was to the tenants, and not to the plaintiff.

The answer denied other allegations.

To so much of the answer as alleged any request by the plaintiff, and to all that is alleged as a ground of any counter-claim, the plaintiff replied by a general denial.

There were other allegations in the pleadings, but enough is here stated to make the questions raised on the appeal intelligible.

To various rulings on the trial, exception was taken by the defendant, which are sufficiently explained in the opinion of the court.

E. J. Phelps, for the appellant.

Jas. W. Gerard, for the respondent.

BY THE COURT. WOODRUFF, J.—On the trial of this cause the plaintiff called a witness, and examined him respecting the description of the building occupied by the plaintiff, its interior arrangements, its condition, occupation, and manner of use at, and immediately prior to, the time when the work complained of was begun by the defendant, and the witness proceeded to describe particularly the excavation made by the defendant, the introduction of the beams into the basement of the premises, when they were put in, and how long certain of the alleged grievances continued, and was proceeding to state how many beams were inserted, their height and position, etc., when the defendant's counsel objected to any evidence as to damages to the basement, as it appeared that they were under-let, and his objection being overruled, he excepted.

We think there was in this ruling no error. Had the testimony tended to no purpose but to show what damage the tenants had sustained, the objection would have been well taken, but the testimony was a part of the history of the defendant's acts tending

to the injury of the entire building—it was a part of the *res gestæ*—it would have been an imperfect and unfair statement of the transactions to state that the defendant removed the foundation wall without at the same time stating what he did to sustain the wall above, and how he did it. Its imperfections or its only partial adequacy might be the very subjects for the consideration of the jury; and although the effect of what was done, upon the plaintiff and his business, was the ultimate end and object of the investigation, these details, we think, clearly relevant and proper.

Besides, although the basement was let to other tenants, the plaintiff himself occupied the rear building, and there was a basement hall at the side of the building, across which the beams were inserted, and it appeared that this hall was used as well as the hall on the first story, for access to the rear building, and for various other purposes, by the plaintiff himself and his family. Its obstruction was, therefore, an immediate injury to the plaintiff, proper to be considered by the jury; and a stair-case was shown to have been removed, which led from that basement hall to the first story, which the plaintiff occupied as a store.

If there was any evidence given subsequently, which tended to show the damages which were sustained exclusively by the tenants, no objection was made, and the attention of the court was in nowise called to it. The general objection above stated cannot, we think, be sustained.

In the course of the examination of another witness, another general objection was stated by the defendant's counsel, which appears in the case thus: "The defendant's counsel objected to testimony as to the general injury to the walls and building," which objection was overruled and exception taken.

To what question this objection was addressed does not appear. The testimony of the witness which follows immediately after such ruling is this: "The water was running down the wall, and tubs were set on the floor to catch the water." The witness was describing the condition of the building after the alleged trespass.

This exception was not urged on the argument of the appeal, and we do not discover any thing in it which requires extended discussion. If we regard the form of the objection it was clearly untenable, the general injury to the walls and building, in connection with the effect of the injury upon the plaintiff and his

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business, were (if the plaintiff's acts were shown to be wrongful) the very subject of inquiry; whether and to what extent the plaintiff should be allowed for cost of repairing the injury was another and distinct question.

What the defendant meant by "general injury" is not very apparent. If he intended by that, that the plaintiff's counsel should point his questions, or the witness address his answers to a distinct specification of each particular place and particular wherein the premises were injured and their occupation rendered less valuable to the plaintiff, this is not sufficiently indicated by the objection.

If he meant that the injury to the walls and building could not be considered by the jury in determining how far the occupation of the plaintiff was interfered with and rendered less valuable, it was clearly untenable. We might, perhaps, say that the objection was too vague and indefinite, and was properly overruled on that ground; but we do not perceive how, in any aspect, the objection could be sustained.

Some other exceptions were taken to the admission of evidence, and an exception also to the refusal of the Judge to order a dismissal of the complaint, but they were not urged on the argument of the appeal, nor referred to in the points which he submitted, and we may dismiss them with the remark that we concur with the defendant's counsel in the opinion that they furnish no ground for a reversal of the judgment.

It is stated in the case made for the purposes of the appeal, among other requests made by the counsel for specific instructions to be given by the court in the charge to the jury, that the defendant's counsel requested the Judge to charge:

"That it was not necessary for the defendant to prove the express consent of the plaintiff for him, the defendant, to take down and remove the old division wall, but that the plaintiff's consent might be inferred from his acts; and if the jury believed, from the evidence, that the plaintiff did consent to the taking down and removal, etc., of the wall by the defendant, he cannot recover any damages therefor;" and the case adds: "But his honor declined so to charge, and instead thereof charged the jury, that unless the defendant had proved a clear and express consent on the part of the plaintiff that the defendant might remove the wall, the plain-

tiff was not precluded from recovering in this action any damages resulting to him therefrom."

To this is also added, "that merely submitting to its being taken down, without attempting to prevent it, from an erroneous opinion that the defendant had a right to remove it, would be no bar to this action. If there was a clear and express consent that it might be pulled down, there can be no recovery in this action, but unless such a consent was given, the plaintiff is entitled to recover."

To the refusal above stated, and to this part of the charge given (as stated) "instead thereof the defendant's counsel excepted."

A slight modification of this part of the charge appears in a subsequent portion thereof, in which the Judge appears to have said, "If the jury believe that it was clearly and distinctly agreed between the plaintiff and defendant that the defendant might remove the wall and insert his needles, and that he should restore the building to a proper condition, there can be no recovery in this action." And again, it is added, "but if each party supposed that the defendant had a legal right to remove the wall and insert his needles, and the plaintiff did no more than submit to what he at the time supposed he could not prevent, and had no right to object to, that is not such an assent as bars his right to recover."

The claim set up in the defendant's answer, and the purpose and tendency of much the greater portion of the testimony given in his behalf, was to show that the plaintiff not only acquiesced in what was done without objection, but that there was a mutual understanding between him and the defendant, amounting to an agreement, that the defendant might remove the wall, and rebuild it, and restore the plaintiff's building to the condition in which it was before the work was commenced.

The acts of both parties were relied upon, (in the absence of the testimony of any witness who heard any express agreement,) as tending to show that such an agreement existed, and it was insisted, that enough was proved to warrant the jury in finding that, in truth, the plaintiff gave a sufficient license to justify the defendant in removing the wall, and sustaining the building by beams or needles in the manner he did.

Was there nothing in the charge on this subject other than the

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instruction above recited, that "if the jury believed that it was clearly and distinctly agreed," etc., it might, perhaps, be regarded as a submission to the jury of all the facts and circumstances disclosed by the evidence, including all the acts of the parties, with the absence of any objection by the defendant, and as leaving to them to say whether an agreement existed, and if an agreement was necessary to the defendant's protection in the sense in which it was used in the charge; the addition that they must also find that it was a clear and distinct agreement would not be material. It does not occur to us that, in reference to a single point under discussion, any thing but a clear and distinct agreement can properly be called any agreement.

But, although this latter portion of the charge, as well as the whole current of the evidence received from the defendant on the trial, seems to us to indicate that the Judge rightly appreciated the rule which, undoubtedly, permits the jury to infer the existence of an agreement or consent from the acts of the parties, or other circumstances, though no witness is introduced who can testify in terms to an express agreement or consent, yet the refusal to charge that it was not necessary for the defendant to prove an express consent, but that such consent might be inferred from his acts, remains in the case not only unexplained and unqualified, but is followed by the instruction, that unless a clear and express consent was proved, the plaintiff is not precluded, etc.

We all concur in saying, that if the jury should find, from the evidence, that the plaintiff actually consented to the acts of which he now complains as a trespass upon his premises, he is not entitled to recover from the defendant. A license is always a sufficient justification of a trespass, and the books are full of pleadings and precedents in which it is treated as a complete defence. And we are equally clear, that a license, not being required to be in writing, it may be proved like any other similar fact, by showing express words of license, or by proof of the acts of the parties, and other circumstances, from which the jury may infer that the plaintiff consented to the alleged trespasses.

We also think that the further instruction above recited, that merely submitting to the taking down of the wall from an erroneous opinion that the defendant had a right to remove it, would be no bar to the action, which was somewhat more explicitly re-

peated, as not warranting the inference that the plaintiff assented to what was done, if each party supposed the defendant had a legal right to do what he did, if not clearly erroneous, was calculated to mislead the jury.

There may, undoubtedly, be a submission to a wrong, done under the assertion of a right, and in spite of the plaintiff's dissatisfaction, a silence where remonstrance is seen to be futile, which could in nowise be regarded as either license or assent. But, on the other hand, a standing by, without objection, when a trespass is committed by one who is at the time acting, not wilfully, but in the belief that he is doing what he has a right to do, may, and often will, in legal effect, operate as a license. It is such an acquiescence as estops a party afterwards to complain of the trespass, when the other party acts in known reliance thereon. This subject is noticed in the opinion of this court in the case of *Miller v. Davis*, at the February General Term, 1856.

A license may be given and proved by parol, and it may not only be inferred from the acts of the parties, in connection with the silent acquiescence of the plaintiff, but such acquiescence may enure as a license by estoppel when the other requisites to create an estoppel *in pais* concur, and we are not aware that in either case the ignorance of the plaintiff of his legal rights can alter the effect or prejudice the defendant.

We might dispose of this appeal without examining the other questions discussed on the argument; but it may be important for the purposes of the new trial, which must be ordered, that they should be disposed of.

The defendant requested the Judge to charge that the plaintiff could not recover for injuries to the freehold, because there is no allegation in the complaint that he (the plaintiff) is responsible to the owner of the freehold for injuries to the premises committed during the continuance of the plaintiff's term; and the case states that his honor declined so to charge, or otherwise in respect thereto than is contained in the charge actually given, viz., "with respect to injuries to the building itself, the plaintiff is entitled to recover what it would cost to put it in a suitable position for the use before made of it. . . . That the plaintiff would be entitled to recover sufficient to put the building in as good condition as when he hired it, natural wear and tear excepted."

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The want of harmony between these two propositions suggests the doubt, whether, in making up the case, some mistake has not occurred which was not corrected in the settlement, and this doubt is strengthened by another statement in the case, which, if true, would show that the plaintiff's lease, with the covenants therein, was not given in evidence at all on the trial, and that the covenants therein, which, it is claimed, made it the duty of the plaintiff to repair, were not even offered in evidence by the plaintiff. The plaintiff had been in the occupation of the premises for more than two years when the alleged trespasses were committed. We cannot think that the plaintiff's counsel claimed, or the Judge intended to be understood, that, under any view of the plaintiff's duty to his landlord, he could recover for any thing more than the injury done to the building by the defendant. In respect to this item, all that he could ask was an amount sufficient to put the building in as good a condition as it was before the trespass was committed; the defendant was not bound to answer for injuries sustained in any manner, whether by natural wear, or otherwise, during the previous two years.

In regard, however, to the question raised by the defendant's request, we apprehend there is no doubt about the true rule. As tenant for a term of years, the plaintiff had a right to be compensated for all the injury done to his possession, and in ascertaining this, the expense necessary to restore the building to such a state as would make that possession as beneficial for the purposes of the tenant as it was before the trespass was committed, should be allowed; but with this limitation, that such allowance should not exceed the value of the plaintiff's term, including the rent he was bound to pay. The limitation stated is necessary, for if the defendant had torn down the entire building, or otherwise driven the plaintiff therefrom, he could (apart from the question whether exemplary damages should be allowed) only recover the value of that possession of which he was deprived.

Had it appeared, however, that by the terms of the tenancy, the plaintiff was bound to make repairs, and restore the premises to the landlord at the end of the term in as good condition as when they were leased, then the defendant was liable to make good all the injury caused by the trespass, and enable the plaintiff to put

the building in as good condition as it was when the trespass was committed.

We incline to the opinion that the allegations in the complaint are sufficient to entitle the plaintiff to show that such were the terms of his lease, and claim damages accordingly, and that the question appertains to the measure of damages; and yet the question is not free from doubt. There is not only no averment that the plaintiff was bound to repair, but it is not even stated that he was put to any expense in repairing, or that he made any repairs. The doubt, if any there be, on the sufficiency of the complaint in this respect, can easily be removed by amendment, which would, probably, have been allowed on the trial, had it been sought by the plaintiff's counsel. He may, perhaps, be advised to seek such amendment before another trial.

The defendant insisted on the trial that the plaintiff could not recover for damages sustained by loss of business, because he had given no evidence of any such loss; and the counsel, on the argument of the appeal, add, as a further reason, that such damages, if sustained, are too remote to be the subject of recovery.

We have had occasion recently to consider this latter proposition in the case of *St. John v. The Mayor*, argued at the December General Term, and decided at the present term, (*ante*, p. 815,) in which we hold, that in actions to recover against a *tortfeasor*, the loss of profits may be taken into view in estimating the damages, though in actions for a breach of contract the general rule is otherwise. (See *Finch v. Brown*, 13 Wend. 601; *Fitch v. Livingston*, 4 Sandf. 514; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281; *Iverson v. Moore*, 1 Ld. Ray. 486; *Lacour v. The Mayor*, 8 Duer, 406.) This does not necessarily embrace a right to recover purely contingent or speculative profits, but will warrant the recovery for such losses as are proved to be the direct consequence of the wrong which is to be redressed.

The proof on the subject given by the plaintiff on the trial was at most exceedingly slight; the only testimony we find in the case as settled, that appears to bear upon this claim, is that of a witness who testifies that he "had nothing else to do but keep brushing and dusting goods all the time; we had cloths, silk velvets, and all kinds; the wall was left open about three months. I (he) re-

mained there nights and watched; the front door had two beams in it, etc.; the light goods were injured and spotted with dust."

We do not think that, in an action in which the damages are not fixed and certain, and upon proofs such as were given, the whole question of injury to the plaintiff's business should have been withdrawn from their consideration. But it was proper to instruct them that the plaintiff could not recover for any loss resulting from the interruption of his business, without proof that his business was interrupted; nor for any loss in his business, without proof of such loss; nor for any greater loss than was proved. We think the language of the charge was substantially to that effect, though we are free to say that, beyond some evidence of injury to the goods, and of increased expense or trouble in taking care of them, no such loss was shown.

It only remains to notice what was said by the Judge, in relation to sheath-piling, and in the refusal to charge that the plaintiff was not bound to sheath-pile and support the premises and soil of the plaintiff. Although one who excavates his own soil is not under an affirmative duty to protect his neighbor's soil from falling, he may not conduct his excavation so heedlessly or recklessly as to unnecessarily cause injury to his neighbor, (*Radcliff's Executors v. The Mayor, etc.*, 4 Comstock, 195-203,) and, on the other hand, the neighbor, having received due notice, should, if he desire to support his own soil, resort to the proper means of doing so. He may not be liable, and, we think, is not himself liable, if he chooses to neglect this precaution. The one who digs away his own soil and so, by the operation of the laws of nature, merely draws upon himself his neighbor's soil or sand, must, we think, submit to the inconvenience, and he has, we think, his election to do so, or to protect himself by sheath-piling or otherwise, as he may be advised.

The judgment must be reversed, and a new trial ordered, costs to abide the event.

CLINTON W. CONGER, and others v. THE HUDSON RIVER RAILROAD COMPANY.

The undertaking and duty of a common carrier are not only to carry and deliver safely the goods intrusted to him, but also to carry and deliver them within a reasonable time, but the first duty is absolute, the second merely relative.

What is a reasonable time depends, in each case, when the question arises, upon its particular circumstances, and is usually, if not always, a question of fact for the determination of a jury.

When it appears that a delay beyond the ordinary time was not occasioned by any negligence, fault, or want of skill of the carrier, but was imputable solely to the recklessness or carelessness of a third party, the law regards it as an inevitable accident, for the consequences of which the carrier is not responsible.

The Judge, upon the trial, charged the jury that the defendants were responsible for the damages caused by a delay in the delivery of cattle belonging to the plaintiffs, even if a collision, which produced the delay, was imputable solely to another railroad company; and he refused to charge, as requested by the defendants counsel, that if the collision was caused by the carelessness of the other company, without any negligence or fault whatever on the part of the defendants, they were not responsible for any damages sustained by the plaintiffs.

Held, that the Judge erred in his charge, and that he ought to have submitted to the jury the question whether the collision was not solely caused by the negligence of the Hudson and Berkshire Railroad Company, as evidence had been given tending to show that such was the fact.

It seems that the defendants, if liable at all, were not so for the shrinkage of the defendants' cattle; their disposition to become restive, and their trampling upon each other as injuries from these causes, must be deemed to have arisen from the nature and inherent character of the property carried.

It seems, also, that damages resulting from the loss of a market, occasioned by a delay not excused; as too speculative and contingent, are not recoverable.

New trial ordered, costs to abide event.

(Before DURE, BOSWORTH and WOODRUFF, J.J.)

December 4, 1856; February 20, 1857.

MOTION on the part of the plaintiffs, for judgment on a verdict in their favor, the questions of law arising on the trial having been directed to be heard, in the first instance, at the General Term.

(The action was brought to recover damages from the defendants, as common carriers, for their delay in the transportation, upon their railroad, of cattle belonging to the plaintiffs, from Albany to New York.)

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The answer denied all the material allegations in the complaint.

The cause was tried before Campbell, J., and a jury, in November, 1854, and the following are the material facts proved upon the trial.

¶ The cattle were received at Albany in the afternoon of the 29th of March, 1854, and would, according to the usual and ordinary course of transportation on the defendants' road, have arrived in New York early on the following morning, (Thursday,) that being what the witnesses call market day; but, by reason of delay, they did not arrive until the evening of that day. From the length of the time consumed in the transportation, the cattle, which were enclosed in cars, became weary; some lay down, and were trampled upon by others, and on their delivery in New York were found bruised and shrunk, and deteriorated in respect to their condition for market. They were sold by the plaintiffs on the following Monday, the next regular market-day, but between the Thursday and Monday the price of cattle in the market fell, according to the testimony, \$1.50 per cwt.

The plaintiffs claimed to recover for the damages sustained from the injuries to and the shrinkage of the cattle, and also damages for the loss of the market on Thursday, on the morning of which day, as they claim the cattle should have been delivered in New York.

The defendants sought to excuse the delay by showing that it happened without their fault.)

The cause of delay was this: One of the defendants' passenger trains left Albany shortly before the freight train by which the plaintiffs' cattle were forwarded; when it reached Hudson it was run into by a train, or engine, of another (the Hudson and Berkshire,) railroad company, and, by the collision, both engines and some other cars were thrown off the track, and the further progress of the passenger train was hindered for several hours.

This detention caused delay to the trains going up, for the passage of which the rules of the road required the conductor of the cattle train to wait at a station above Hudson. Evidence was given upon the question whether the collision resulted solely from the negligence of the Hudson and Berkshire Railroad Company.

The defendant's counsel, on the trial, requested the Judge to

charge, that if the collision was the result of the carelessness of the Hudson and Berkshire Railroad Company, and that the defendants were not guilty of carelessness or negligence, the defendants are not responsible for any damages sustained by the delay in delivering the property; and to the refusal of the Judge to so instruct the jury the defendants excepted.

The Judge charged that common carriers are responsible for damages to personal property, whilst in their care, which may be ultimately delivered, whether such injury was occasioned by the carelessness or negligence of the carriers or not. That, in this case, the delay which caused the damage arose out of a collision between a train of the defendants and a train of the Hudson and Berkshire Railroad Company, and that the defendants were responsible for the damages sustained in this case, although that collision was caused by the negligence of the Hudson and Berkshire Road alone.

To these portions of the charge the defendants excepted.

By direction of the Judge the jury, on finding for the plaintiffs, stated their assessment of damages severally in two items, viz.: For injury to the cattle and shrinkage, \$260; and for loss of a market day, \$520.

The case was, therefore, ordered to be heard at the General Term, upon the questions of law raised upon the trial.

W. Fullerton, for the defendants.

I. We contend that the accident which caused the delay from which the damage arose in this case, was not the result of defendant's negligence and that,

II. Common carriers are not liable for damages for mere delay in the delivery of property entrusted to their charge, if such delay arose from causes which they could not control. (*Parsons v. Hardy*, 14 Wend. 215; *Bowman v. Teal*, 28 Wend. 306; *Lager v. The Portsmouth R. R. Co.* 1 American R. R. Cases, 171 and note.) The Judge's charge was, therefore, erroneous, and we are entitled to a new trial.

III. The special contract in this case limited the liability of defendants, and they are not responsible in this case. (*Lager v. Portsmouth R. R. Co.* 1 American R. R. Cases, 171.)

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IV. The charge of the court, therefore, was incorrect. The Judge should have charged as requested.

P. G. Clark, for the plaintiffs.

We insist that the Judge correctly charged the jury, that the defendants were responsible for damages to the plaintiff's property, whether it was occasioned by the defendants' carelessness or negligence or not; and that the defendants were responsible for the damages occasioned by the collision, although that collision, was caused by the negligence of the Hudson and Berkshire Road alone. 1. The defendants are common carriers, and as such are responsible for all losses, except those occasioned by the act of God or of the king's enemies. (Story on Bailments, § 489-491.) By the "act of God" is meant natural accidents, arising from superhuman causes, and not accidents arising from the negligence of men. (Story on Bailments, § 511; 2 *Kent Com.* p. 602; *McArthur v. Sears*, 21 Wend. 190; *Camden & A. T. Co. v. Burke*, 13 Wend. 611; *Mershon v. Hobensack*, Supreme Court of New Jersey, Law Reporter for December, 1850, page 415; *Plaisted v. Boston & R. &c. Co.* 27 Main. R. 132.) 2. The rule and the principle of the rule are the same whether there be a total loss of the property caried, or a partial loss or damage to property ultimately delivered. (*Smith v. Griffith*, 3 Hill, 333; *Camden & A. T. Co. v. Burke*, 13 Wend. 611; *Pindall v. Renck*, 4 McLean, 259; *Burritt v. Renck*, 4 McLean, 325.)

BY THE COURT. WOODRUFF, J.—The undertaking and duty of a common carrier, on receiving goods for carriage, is twofold: First, to carry and deliver safely. Second, so to carry and deliver within a reasonable time.

The first duty is absolute. Nothing but the act of God or the public enemies will relieve the carrier from its performance.

The second duty is relative, depending upon various circumstances and conditions under which goods are received, the means at the command of the carrier, and the absence of fault on his part in the provision he has made for the performance of his duty.

What is a reasonable time must always be determined by the circumstances under which the carrier acts, and not by the inquiry

what, under other circumstances, would be reasonable, nor even by the inquiry what period is ordinarily required for the performance of the service.

The distinction above stated is to be found in the elementary writers treating of the law of common carriers, and is, I apprehend, too well settled to be now open for discussion; and its recognition in this state unequivocally appears in *Parsons v. Hardy*, (14 Wend. 217); *Harmony v. Bingham*, (2 Kern. 99); *Wibert v. The New York and Erie Railroad Co.* (ib. 245: S. C.; 19 Barb. 36).

The delay in the present case is alleged by the defendants to have arisen from the negligent act of another railroad company, without fault on their part, by which their cars were thrown from the railroad track, and the passage of the following train (containing the plaintiffs' property) necessarily hindered.

The case of *Parsons v. Hardy* presented the precise question whether such an accident, caused by the act of third parties, through their misadventure or negligence, excused the delay. The court held, "that evidence that the delay was so caused, was admissible," and that if the fact were proved, and the accident shown to have occurred without any want of diligence, care and skill on the part of the carrier, it would excuse the delay.

And we understand the decision of *Wibert v. The New York and Erie Railroad Co.* to decide that common carriers, when there is no express agreement to carry within a limited time, are not responsible for delays occurring without their fault, and that this is true as well of the common law obligations of carriers as under our statute, which was the subject of much discussion both in the supreme court and court of appeals.

It is hardly necessary to add, that in disposing of this case we must be governed by the decisions referred to, and it is, therefore, unnecessary to extend our discussion upon this point.

The application of those cases to the present, shows that there was error in the charge of the Judge on the trial.

He charged that the defendants were responsible for the damages caused by the delay in making the delivery of the plaintiffs' cattle, although the collision, which produced the delay, was caused by another railroad company; and he refused to charge that if such collision was caused by the carelessness of the other company, and the defendants were guilty of no carelessness or

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negligence, the defendants were not responsible for any damages sustained by reason of delay in the delivery.

This, we apprehend, was making the duty of the defendants, to carry and deliver within the usual and customary period of transportation from Albany to New York, just as absolute and unqualified as their duty to carry and deliver. In effect, it allowed no excuse for delay, which would not excuse a failure to deliver.

If the accident, which caused the delay, happened through the fault of another company, and without any concurring fault or neglect on the part of the defendants, then, as to them, the accident was inevitable, in the sense that excuses the delay, within the rule declared by the cases above mentioned.

And if the defendants, therefore, failed in no duty which they owed to the plaintiff, they not having stipulated, by their contract, to carry and deliver within any limited time, are not responsible for damages resulting from the delay in delivering the cattle in question.

How the jury would have found, had the question whether the delay, and the consequent injury to the plaintiff's cattle, were without the fault or negligence of the defendants or their servants, been submitted to them, we are not able to say. If we could determine what is the weight of the evidence upon that subject, we should not consider ourselves at liberty to do so. But if the jury had found in the defendants' favor, upon that question, then the delay was caused by what was, as to the defendants, an inevitable accident, which, according to the cases mentioned, would excuse them.

If, then, the defendants are not responsible for the delay in the delivery, that being excused, the excuse must necessarily relieve them from liability for any injury to the property which is the mere result of the delay. That is, in the case before us, the injury described by the witness as the shrinkage, fatigue, and trampling of the cattle upon each other, by reason of the increased time consumed in the carriage.

So far as this was the mere result of delay, it must stand upon the same footing as the depreciation or deterioration of property, in the course of transportation, from its own inherent character and liability to decay, or injury from mere lapse of time, or from the act of carriage itself. No rule of responsibility imposes upon

the carrier losses arising from the ordinary deterioration of goods in quantity or quality, in the course of transportation, or from their inherent infirmity or tendency to decay.)

We are not able to perceive any reason upon which the shrinkage of the plaintiff's cattle, their disposition to become restive, and their trampling upon each other when some of them lie down from fatigue, is not to be deemed an injury arising from the nature and inherent character of the property carried, as truly as if the property had been of any description of perishable goods.

The rule undoubtedly requires of the carrier, that he use all reasonable and proper care that the delay may not be unnecessarily prejudicial.

And under the rule above stated, if the delay was without the fault of the defendants, it is entirely clear that the damages, which consisted (as alleged) in the loss of the market, cannot be recovered. The claim has no foundation whatever, save in the mere lapse of time, and if that be excused, the claim is obviously groundless.

This, perhaps, renders any further discussion of this case unnecessary; but I add, nevertheless, the further observation, that if the delay was caused by the admitted negligence of the defendants, I very much doubt the liability of the defendants to any such claim. In the absence of an express agreement as to time, made with a view to a delivery for the market of a specified day, it cannot be intended that the contingencies of the market were at all within the contemplation of the parties; nor is it obvious what particular day is to be taken by which to test the amount of such a loss. There would seem to be no reason for taking the very day of the expected arrival, if intermediate to that day and the day of the trial, there has been a fluctuation in prices, some higher and some lower than on the first-named day. Nor would it be reasonable to fix the time for ascertaining the depreciation at the very day of the actual arrival, without permitting the defendants to say, and show, that if the plaintiff had left the property for some reasonable time thereafter, they would have realized from the higher prices then prevailing, as much, or even more, than by a sale on the day when the property was expected to arrive.

In truth, damages of this description are too remote and contingent to be ascribed to the delay, whether the delay be excused

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or not. They do not result from the delay, but from other causes. *Non constat* that the plaintiffs would have sold their cattle had they arrived one day earlier; or, if they had sold them, that they would have brought any higher price than they did bring. It cannot be known but that the addition of these very cattle, to the stock on hand, would have produced, one day earlier, all the fall in the market which took place on the day of their arrival. But I do not deem it necessary to pursue this branch of the subject, since, if the delay be excused, the claim necessarily falls. In the able opinion of Mr. Justice Marvin, in *Wibert v. The N. Y. & Erie R. R. Co.* (19 Barb. 36,) this subject is very fully discussed, and his conclusion is ably sustained, viz., that no recovery can be had of damages of this description, from whatever cause the delay arises. In the Court of Appeals the decision that, the delay having occurred without the fault of the defendants, they were not liable at all, rendered the discussion of this other question unnecessary.

A new trial must be ordered, with costs to abide the event.

COLEGROVE v. THE NEW YORK and HARLEM RAILROAD COMPANY, and THE NEW YORK and NEW HAVEN RAILROAD COMPANY.

The complaint states, as a cause of action, that the plaintiff, while a passenger in the cars of the Harlem Company, was injured by such negligent management by each company of its train of cars, that the two trains came in collision, and that by such collision the injury was inflicted. Each company answered separately, denying negligence on its part.

The jury found that the collision which caused the injury was produced by the concurring negligence of the two companies.

Held, if the cause of action against each company is, on the facts stated, several and not joint, the misjoinder is cured by answering and by omitting to demur, and neither had a right to a separate trial; such defect appearing on the face of the complaint.

The plaintiff was injured by the collision; a single and forcible act, caused directly by the joint action of the two, and without such concurring action or common negligence, there might have been no collision and no injury. For an injury thus caused, trespass would lie. All who concur in a forcible and wrongful act, which directly injures, may be sued jointly. Neither defendant, though sepa-

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rately sued, would be exonerated from any part of the damages resulting from an injury thus caused.

The negligence of the Harlem Company cannot be imputed to the plaintiff, in such sense, as to exempt the New Haven Company from liability to him. The Harlem car was not the carriage of the plaintiff, nor one subject to his control, or under the management of his servants.

Although a defendant moves for a nonsuit at the close of the plaintiff's evidence, and on such evidence alone, is entitled to it, and excepts to a decision denying the motion, yet, if instead of standing on the exception he gives evidence, and a verdict ultimately passes against him, on sufficient evidence and under a proper charge, his exception will not entitle him to a new trial. It is waived by giving evidence to the merits sufficient to establish his liability.

The same is true of an exception to a decision overruling an offer of the defendant to demur to the plaintiff's evidence.

The fact that the plaintiff stood on the platform of the Harlem car at the time of the collision, is no answer to his action against that company, no notice being at the time posted up as required by section 46 of the Laws of 1850, p. 234. He owed no duty to the New Haven Company, which made it negligent in him, as between himself and that company to be there, in view of the possibility of coming in collision with one of the trains of that company, which, according to its regulations, had no right to be on the track on that day, and which there was not the slightest reason to suppose might be on it.

If a passenger in one of two trains, owned and run by different companies, is injured by their coming in collision, and such collision would not have occurred if both companies had exercised that ordinary care which they owed to all persons travelling on the road, and if the plaintiff, as between himself and both companies, was lawfully where he was, and if he was guilty of no negligence in not anticipating such a collision, and in not seeking a seat with a view to its possible occurrence, the fact that he was on the platform of a car, when injured by such a collision, is no bar to his right of action against either company.

On such a state of facts, and when no negligence can be imputed to the plaintiff, except the mere act of riding upon the platform, it is not erroneous, or calculated to mislead a jury, to instruct them that the general rule is, that the negligence of a plaintiff which goes to excuse the defendant's negligence, must be such negligence as contributed to the accident which caused the injury.

Woodruff, J., dissenting, *held*, that, on the facts of this case, an action would not lie against the defendants jointly. The collision is not the cause of action and ground of liability, but the negligence which caused it. Each defendant is liable for the fault of its own servants, and for that only. The companies were acting wholly independently of each other, and were not discharging any common obligation to the plaintiff, and violated no duty which they owed him in common. The *culpa causans* is separate, in respect to each defendant, and whether injury results concurrently, or otherwise, cannot change their relation to each other, or to the plaintiff.

The liability of either defendant is not founded in any act of such defendant, but in negligence only, and such negligence in nowise tended to produce negligence in the other. A joint verdict against the defendants, on the facts of this case, should not be sustained.

The Judge erred, in charging that the general rule is, that the negligence of a

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plaintiff that goes to excuse the defendants, must be such negligence as contributed to the accident, that caused the injury. Cases specified, in which such a statement of the rule of law would be erroneous. The true inquiry is, whether the plaintiff's injury is attributable, in part, to his own carelessness; whether his negligence contributed to his hurt?

The charge in this respect was erroneous and prejudicial to both defendants, and particularly so to the New Haven Company. A verdict and judgment against the defendants jointly are not proper in this action, and the verdict should be set aside, and a new trial ordered.

(Before DUNN, BOSWORTH and WOODRUFF, J.J.)

Dec. 2, 1856; Feb. 21, 1857.

THIS action came before the court, at General Term, on a verdict for the plaintiff, subject to the opinion of the court at General Term, on the questions of law presented by exceptions taken at the trial. It was tried before Mr. Justice Slosson and a jury, on the 5th of December, 1855.

The action is brought against both defendants, to recover damages for injuries sustained by the plaintiff, while a passenger on the cars of the Harlem Company, from a collision between the trains of the two companies, occurring about six o'clock, A. M., on the 26th of November, 1854, at about Fifty-eighth street, in the city of New York. Both trains were going in the same direction, and into the city, the train of the New Haven Company, being the forward train. That train was a freight train, and was due at the Centre-street depot at fifteen minutes past eleven, P. M., of the preceding day. It had been delayed by a freight train of the Harlem Company, on the track, due in New York city subsequently to the New Haven train, but how much of its delay had been thus caused did not distinctly appear. The train, in which the plaintiff was a passenger, left White Plains at five minutes past five, A. M., that morning, without brakemen, five o'clock being its regular time to leave. The plaintiff was a commuter, a daily passenger in the cars of the Harlem Company, and, on the morning in question, got upon the cars at 125th street, and upon the rear platform of the first car of the train. There were unoccupied seats in the last two cars of the train, but none in the first car, and the plaintiff did not have time to find a seat before the train started.

The complaint charges that a collision occurred between the two trains, by reason of the agents of each company managing its

train "so negligently, recklessly, carelessly, and wrongfully, and without the exercise of ordinary or proper prudence, vigilance, or precaution," that the train of the Harlem Company ran into that of the New Haven Company, whereby the plaintiff, without any default on his part, was knocked down and his ankle fractured, and was otherwise injured, the particulars whereof were specified.

Each defendant answered separately, denying all negligence, and charging all negligence causing the collision to the other company, and charging that it was an unnecessary act, and culpable negligence in the plaintiff, to be on the platform of the Harlem car, and that such negligence was a bar to his right to recover.

When the plaintiff had concluded the evidence on his part, and rested his case :

Mr. Sandford, the counsel for the New York and Harlem Railroad Company, then moved to dismiss the complaint, on the ground,—

1. That the plaintiff had failed to show any negligence by the New York and Harlem Railroad Company ; and

2. That the plaintiff has shown negligence on his part, in standing on the platform, which contributed to produce the injury alleged to have been sustained by him.

Mr. Noyes, on behalf of the defendants, the New York and New Haven Railroad Company, moved to dismiss the complaint, on the ground,—

1. That no joint action could be maintained against the two companies, the defendants in this action, without proof of a joint act of negligence or concurrence in such joint act, which was not pretended.

2. That no action could be sustained against the New York and New Haven Railroad Company, because the plaintiff was guilty of negligence in being on the platform of the Harlem cars, when there was room inside, in violation of the statute applicable to that company, and of its rules and notices.

3. That there was no proof of negligence against the New Haven Railroad Company, which contributed to the injury.

The court denied the motions, and the counsel for the defendants severally, duly excepted.

The plaintiff was then permitted to give some further evidence; that being done he again rested.

The counsel of the Harlem Company then stated their defence to be, that the collision was caused wholly by the negligence of the New Haven Company.

Mr. Noyes, on behalf of the defendants, the New York and New Haven Railroad Company, then moved for a separate trial for the defendants, the New York and New Haven Railroad Company, as provided in the 258th section of the Code, because the defences of the two companies were entirely distinct, and each consisted in imputing negligence to the other to some extent, and a joint trial was calculated to prejudice their rights.

The court denied the motion, and the counsel of the New Haven Railroad Company excepted.

Mr. Noyes then stated orally that he offered to demur to the plaintiff's evidence, as against the New York and New Haven Railroad Company, and proposed to put in a formal written demurrer. The court overruled the offer, and the counsel excepted.

The court then directed the counsel for the New York and New Haven Railroad Company to open the case on their behalf, when the counsel for the Harlem Railroad Company had closed his evidence, to which direction the counsel for the New York and New Haven Railroad Company excepted.

The Harlem Company then proceeded to examine witnesses on their behalf. When their examination was concluded, the counsel for the New Haven Company opened their defence, and examined witnesses on their part.

When the whole testimony had been given, the following proceedings, as the case states, were had.

Mr. Sandford, for the Harlem Railroad Company, then moved to dismiss the complaint, on the following grounds:

1st. That the plaintiff was himself guilty of negligence, contributing to the injury, by standing on the platform.

2d. That no negligence of the Harlem Company was proved.

Mr. Noyes moved to dismiss the complaint, as against the New York and New Haven Railroad Company, for the same reasons as before stated.

The court denied both motions, and the counsel for the defendants duly excepted.

The counsel for the defendants, the New York and New Haven Railroad Company requested the court to charge :

1. If the jury believe, from the evidence, that the plaintiff knew of the regulations against standing on the platform, and that he stood on the platform, when there was either sitting or standing room inside any of the passenger cars composing the train, and his thus standing there contributed to the injury which he received, he cannot recover.

2. If the jury believe, from the evidence, that the printed regulations against standing on the platform were posted up at the time when the plaintiff took his passage, in a conspicuous place inside the passenger cars, and that there was room inside any of those cars for the proper accommodation of the plaintiff, either sitting or standing, the plaintiff cannot recover.

3. If the jury believe, from the evidence, that any negligence of the plaintiff, in standing on the platform, contributed to the injury received by him, he cannot recover.

The counsel for the New York and Harlem Railroad Company requested the court to charge as follows :

1. That the New York and New Haven Railroad Company had the right, by law, to run their cars and engines over the Harlem Road on this island, and the Harlem Company is not liable for any violation of the rules of the Harlem Company by the New Haven Company.

2. That the defendants, the New York and Harlem Railroad Company, are not liable, unless it is proved that some negligence of that company, or its agents, occasioned plaintiff's accident.

3. That the burden of proof, to show that plaintiff's injury was occasioned by negligence of the defendants, rests upon the plaintiff.

4. That the defendants are not liable if the injury was occasioned, in whole or in part, by the negligence of the plaintiff.

5. That standing on the platform of a car is negligence, and declared by law to be negligence, if there was room for the plaintiff inside of the cars, and the notice up.

6. That when the defendants prove that notices were habitually up in the cars for a series of years, so that daily riders always saw them, before and after the accident, the burden of proof is thrown on the plaintiff to show that they were not up on that day.

7. That it was the duty of the plaintiff to take his seat in the

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cars at the place he got on board, if there were then vacant seats in the train, and he had that knowledge of the usual condition of the train, to know where to find the vacant seats.

8. If the injury was produced in part by the negligence of the plaintiff, and in part by the negligence of either or both defendants, the plaintiff cannot recover.

The court then charged the jury as follows:

This action is brought against the Harlem Railroad Company and the New Haven Railroad Company jointly; and in that respect it is a peculiar case. The New Haven Company was authorized by a statute of our state, passed May 11th, 1846, to continue their road from the dividing line of the states of Connecticut and New York, through Westchester county, to the New York and Harlem Company's line of road in said county, and to connect it with the Harlem Road at or near Williams' Bridge, and then to carry and transport passengers and property over that part of the route. And by a subsequent statute, the New Haven Company were authorized to use the road already constructed by the Harlem Company, from the point of junction of the two roads, at or near Williams' Bridge, down to this city, and to transport passengers over that part of the road, under such regulations and rules as the two companies might agree upon.

The two companies made an arrangement by which it was agreed, that they should run their cars on the common road, under the rules and regulations adopted by the Harlem Company.

The plaintiff in this action was a passenger on the Harlem train, and his contract was made with the Harlem Company, and not with the New Haven Company.

Thus, you will perceive, at the very outset of this case, the question is presented, how far this plaintiff, who had made his contract with the Harlem Company, can hold both companies jointly liable for this injury. This is a novel question, and it is one which I deem it right to reserve for the consideration of the court above. But, in order that there may be no embarrassment with regard to the disposition of the case here, and for the purposes of this trial, I shall instruct you, that if you find negligence on the part of both of these defendants, the plaintiff will be entitled to recover against them jointly for that negligence.

[To this the defendants' counsel severally excepted.]

The question of the defendants' liability, on the ground of negligence, will be left wholly to you, and you will be at liberty to find them both guilty, or only one guilty, or neither guilty, as you may think the evidence will warrant. Therefore the case will go to you disembarrassed of the question of the propriety of both companies being united as defendants in this action, and you will address yourselves to the consideration of the case as though no such question existed.

The first question to be disposed of is, whether the plaintiff, in standing upon the platform, was himself guilty of such negligence as exempts the defendants from liability? The general rule is, that where a party by his own negligence contributes to bring about the occurrence by which the injury is effected, he cannot recover. [To this the defendants' counsel excepted.] Now, standing upon the platform of the car could, in itself, have had no effect in producing the collision by which this injury was effected. Of itself, therefore, it would be no defence to the company, in case of an accident occurring. I mean the mere fact of standing upon the platform of a car. [To this the defendants' counsel excepted.] But the defendants rely upon the provisions of the Statute of 1850, called the "General Railroad Act," in which was incorporated a provision to this effect:

"SEC. 46. In case any passenger, on any railroad, shall be injured while on the platform of a car, or in any baggage room or freight car, in violation of the printed regulations of the company, posted up, at the time, in a conspicuous place, inside its passenger cars then in the train, the company shall not be liable for the injury, provided said company at the time furnished room inside of its passenger cars, sufficient for the proper accommodation of passengers."

The defendants contend that this is absolute, and that the mere fact of being upon the platform while accommodation, whether sitting or standing, existed in any car of the train, (the notice required by the statute being posted up,) would, of itself, exempt the defendants from liability, whatever may have been the degree of their own negligence. I do not so construe the statute. [To this the defendants' counsel excepted.] Such a construction throws the whole responsibility upon the passenger. The statute was intended, it is true, in part at least, for the benefit of the companies;

but it must receive a reasonable construction. Independent of this statute, a railroad company should be liable for the safety of a passenger whom it had undertaken to convey, wherever it might see fit to place him, or wherever he might see fit to place himself, upon the cars, always provided his so placing himself was not an act of negligence contributing to the injury or disaster. [To this the defendants' counsel excepted.] To guard against the recklessness and wilfulness of passengers in selecting places of danger, and both for the protection of the passenger and the company, the statute steps in and says that the company shall not be liable in the case of a passenger who, in violation of the printed regulations posted up in the cars, receives an injury while standing upon the platform.

These regulations, you will observe, are to be placed in a conspicuous place in the interior of the cars, and the statute evidently contemplated the case of a passenger leaving the interior of the cars and wilfully standing upon the outside platform. But, apart from this, the statute was not intended to, and does not, exempt the company from the observance of those rules and regulation, police, and prudent management of the business of transportation, which are essential to the safety of the passenger, and to the effectual carrying out of the policy of the statute. The company has no right to permit its cars to be overcrowded, or to permit more persons to accumulate upon one particular car than that car can conveniently accommodate in the inside; and by "convenient accommodation" I mean what the statute calls "proper accommodation;" and that is, that accommodation which is furnished by seats in the inside of the cars. The company has no right to permit a crowd at a station to rush into a car which cannot thus accommodate them, and then to start with them upon the journey without giving them an opportunity to seek for seats in the other cars if there are none in the car into which they first get. If a railroad company does do this—if it permits any number, without restriction, to crowd into any one car, without regard to the means of accommodation within the car, to stand upon the platform, and no opportunity is allowed them, before the cars are in motion, to seek for accommodation in other parts of the train—it cannot claim the exemption intended by this statute. [To this the defendants' counsel excepted.] Such persons, though in a place of danger, are there by the consent of

the company, and lawfully there; and the obligation to transport them safely recurs in its full force, notwithstanding the printed notice posted up which forbids the passengers to occupy such a position. It is virtually a waiver by the company of the benefit of the statute thus to permit passengers to crowd a car, so as from necessity to force some upon a platform, without giving them the opportunity to find accommodation in other parts of the train before it is in motion. The statute does not exempt the company from the necessity of enforcing its own rules. It will not extend its protection to a company which wantonly or heedlessly permits passengers thus to commit the abuse against which the statute was intended to guard, nor is it an answer to say that the passenger, by seeking other cars than the one in which he happens to be, might find accommodation, unless he has time to do this before the cars are in motion. No passenger is bound, while the train is in progress, to leave his position in one car, though that position be upon the platform, to go to another car merely to seek a safer place. [To this the defendants' counsel excepted.] He would, by that very act, expose himself to a greater danger. Nor is it an answer to say, that there is standing room in the aisle of the car. [To this the defendants' counsel excepted.] The aisle is not a place for passengers. The safety, comfort, and convenience of all the passengers require it to be kept perfectly unobstructed. No passenger can be compelled to stand there, and no passenger should ever be permitted to do so. The original fault in such a case is in the company, who, by its agent, the conductor, permits the passenger to get into a car where there is no sitting accommodation for him. The matter is perfectly susceptible of arrangement by the company. At every station means can be employed to direct passengers to vacant seats. Time should be taken for this purpose, and the train should never start till every passenger is provided with a seat. Apart from such direction, a passenger is under no legal obligation to get into one car rather than another; but every passenger is obliged to submit to all proper and reasonable regulations of the company; and the one that I speak of would be eminently such a one. A passenger would have no more right to get upon a car already filled with passengers, if forbidden by the conductor, than the company has a right to take more passengers than it can conveniently accommodate with seats.

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If the passenger, notwithstanding that he is thus forbidden, persists in getting upon the platform, he is there unlawfully, and in case of an accident, the statute shields the company. If the company undertake to carry in any one car more than they can accommodate with seats, so that some are, from necessity, forced to stand upon the platform, and have no opportunity before the train is under way to find seats in another car, such persons are there by permission of the company, and are lawfully there; and the company can claim no exemption under the statute, no matter how conspicuously their notices may be posted in the interior of the cars. [To this the defendants' counsel excepted.]

If a passenger is received into a car where there is sitting accommodation, and then voluntarily deserts his place in the interior, and without permission or authority from the conductor, stands upon the platform, and there receives an injury, he has no redress against the company, though the injury be the result of negligence upon the part of the company, provided the notices required by the statute were conspicuously placed in the interior of the car at the time of the disaster. There is no evidence in the present case to show that the plaintiff was forbidden by the conductor to take the platform of the first car at the station at which he got upon it, or that any one car was designated as one in which he could find sitting accommodation. There is no pretence that there was sitting room in the first car, the one he got upon. If there was no opportunity given to him to look for a seat in one of the rear cars before the train was put in motion, then the plaintiff was not obliged to leave the platform; but, being there by permission, he was lawfully there, and entitled to all the protection of a seated passenger in the inside. [To this the defendants' counsel excepted.]

If you find that he had this time and opportunity, that is, that after getting upon the car he had time before the train was in motion to have sought for a seat in the rear cars, and if you further find that the notices prohibiting the standing upon the platform were posted up in the inside of the cars at the time he took his passage, and you shall find that there was accommodation in either of the rear cars, then his remaining upon the platform being purely voluntary, he has lost his redress against the company, and your verdict must be for the defendants. [To this the defendants'

counsel excepted.] If you find the contrary, then the next question for you to consider will be that of the negligence of the defendants. The defendants are not liable if the catastrophe was the result of inevitable force or accident. The defendants are liable only in case the disaster was produced by their own negligence. Negligence having no connection with the disaster is not to be regarded in this action. These defendants can be held jointly liable only in case the negligence was joint. If either was innocent of any fault contributing to the disaster, your verdict must be for that defendant. If both were innocent, your verdict must be for both. Both companies were in the lawful possession of the same road, and each entitled to run their cars over it, and both were running under the same rules and regulations; and though one company is not responsible for the wrongful act of the other whereby an injury is inflicted, without its agency, upon a passenger, both are responsible where the injury is the result of a mutual negligence. [To this the defendants' counsel excepted.] This is the law of this case for the purposes of this action, until the question which is to be reserved shall be settled by the court in full bench. The law exacts the greatest possible care and diligence on the part of a railroad company. [To this the defendants' counsel excepted.] This extends to the employment of proper servants and agents, and for whose conduct, skill, and diligence, and capacity for the various stations to which they are assigned, the company are liable.

The obligation safely to transport passengers, does not rest, at least wholly, on the consideration of the payment of fare, or the contract of hire between the passenger and the company, but upon the moral duty which imposes upon one who undertakes a service the obligation to perform it, and on the further obligation which rests upon every man and corporation, so to conduct his affairs as not to injure others; so that a person lawfully upon a railroad train, or other conveyance, though an invited guest, and having paid no fare, is entitled to be safely conveyed. The principle of this rule is, under the circumstances, equally applicable to both these companies, so that neither can do an act by which a passenger upon the train of the other should suffer injury, without liability to such passenger. These defendants mutually claim, that if there was any fault, it was not its own, but that of the

other company. This they have a right to do; and you have a right to discriminate, and say upon which the fault lies, if it does not rest on both. You may acquit either, if in your opinion the evidence warrants it.

I shall not recapitulate the evidence. You have the elements of judging all before you. But there are certain leading outlines of the testimony to which it is proper I should call your attention. Special attention is to be paid to the regulations of the time-table, as to the time of starting and the detention of the cars. The companies were bound to run in conformity to these tables. This is a legal obligation upon their part; they are bound to observe the time which they have prescribed. You must judge where the fault originated, by which this collision took place. The New Haven freight train (which is the train with which the passenger train, upon which the plaintiff was, came into collision), it appears, was due at Centre street at a quarter past eleven o'clock of the evening previous to the accident. The Harlem freight train was due at 27th street at half-past twelve o'clock,—after the New Haven freight train. Yet we find that the latter, the New Haven freight train, was behind the former, the Harlem freight train, and was detained at Yorkville by the accident to the former, until within a few minutes before the arrival of the passenger train, in which the plaintiff was. Now, how was this? Was the New Haven freight train thus detained by inevitable accident? If not, it was out of its place, and in fault. [To this the defendants' counsel excepted.] You are to determine whether this freight train might not have reached the city in proper time, and whether its not doing so was the result of its own negligence. If it had reached this city according to its time, there would, so far as the evidence shows, have been no collision; because the evidence is, that the Harlem freight train which preceded it, did reach the city without accident, and the collision was with this New Haven freight train. Then again, you must determine, whether if the New Haven freight train is excusable for being out of time, it was guilty of negligence after it got into its position behind the Harlem freight train; to wit, at and after leaving Yorkville. This inquiry, of course, embraces all those points of vigilance, precaution, and prudence, upon which counsel have so fully and ably discussed the matter before you. Had the New Haven freight train

the necessary lights hung out behind it, as prescribed by the regulations of the road? Did it use the precautions which by the rules of the road it was bound to use?

[The Judge here adverted to, and read to the jury, rules 1, 4, 5, 8, 14, 10, as contained in the time-table hereto annexed.]

You will have to determine whether or not these various precautions have been neglected, or whether these rules have been violated; and if, upon a careful consideration of the testimony, you should be satisfied that the New Haven freight train was guilty of a violation of any of these rules, provided the case called for the observance of them; that is, if this was a contingency in which either one of those rules ought to have been observed by the conductor of the New Haven freight train, and that they were not observed, then the New Haven freight train in that particular would be guilty of negligence.

Mr. Noyes.—I would ask your honor to charge, that the violation of any rule cannot make the defendants liable unless that violation contributed to the accident.

The Court.—I have already stated to you, gentlemen, that if you find there was neglect upon the part of the New Haven train in observing these regulations, you must be satisfied that the neglect contributed to bring about this disaster—this collision. A neglect of any of the rules of the company which had no bearing upon this collision, you have nothing to do with. The plaintiff can only recover damages here against either of these companies, in case he has proved, or the evidence proves to your satisfaction, that both or either of the companies was guilty of such negligence as produced this collision. Then, as to the Harlem passenger train. Was the absence of the brakeman sufficiently supplied by the conductor? If not, it was negligence to have left White Plains without the brakeman, if in your judgment this absence of the brakeman contributed to produce the disaster. If the New Haven freight train had red lights out, was it or not the fault of the engineer and firemen of the Harlem passenger train, that they were not seen? There is a great deal of evidence bearing upon that question, as to the fact of the New Haven freight train having the necessary lights upon the rear of its car, and as to the extent to which such lights will be seen upon a foggy morning; and the evidence of Mr. Green I commend to your very careful con-

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sideration. You must consider whether the fact of his taking that large red light and running back eighty rods, so as to give notice to this passenger train coming down, has been sufficiently proved. If it is true that the conductor stood upon the platform of the rear car of the New Haven train, and waved that red light, and then sprung off and ran back sixty or eighty yards, waving that light until he met the Harlem passenger car, it is then to be explained how it was that the engineer and firemen of the passenger train did not observe it.

If you are satisfied of the truth of the statement of Green, how could it be that the engineer and fireman of this down-coming train did not see the lamp; and if you are satisfied that if they had seen this light they could have brought up and stopped the progress of the train in time to prevent the collision, and their not doing so is not in your opinion excused, then that negligence contributed to the catastrophe, and was a fault for which the company are liable, because the company are bound to have men upon their cars who will exercise all that prudence, caution, foresight, and care over the road, that the position in which they may be at the particular time calls for; and the position of engineer and fireman upon the train as lookouts is very important, and necessary for the safety of the train, perhaps quite as much as the ordinary operations of a fireman or engineer in the management of the engine itself. If the being out of time is excusable as respects the New Haven freight train, was the detention of the Harlem freight train at Yorkville excusable? It was owing to a breaking of the switch that this train was thrown out of its gear, and upon the wrong track. In regard to this point, this was on the Harlem Company's own road, and the company are bound to see that their road was in proper condition, and they are responsible for such a defective condition of the switch as would subject it to breakage, unless it resulted from such a cause as it would be impossible for them to control. You will have to determine whether this getting off of the track, which was the effective cause why all this detention and the collision took place, was an inevitable accident. You will bear in mind the rules regulating freight trains in respect to keeping out of the way of passenger trains; and you will apply the same rules to this as to the other company, and determine in the same manner the question of their negli-

gence. You will determine upon the whole evidence, and whether there be any fault, and where it lies, and regulate your verdict accordingly. Should you come to the conclusion that the defendants, both or either, are guilty of a negligence by which this disaster was occasioned, the only remaining question will be as to the damages. Upon this point, gentlemen, the rule is simple. You will take into consideration the nature of the plaintiff's occupation; the length of time he was prevented from labor; the amount of wages he lost and is still losing; the nature of his injury, and the bodily sufferings to which he was subjected. For this bodily suffering and pain, you will give him a fair and liberal compensation. You will consider the nature of the injury, also the probabilities of the duration of its effects. The only evidence is that of his physician, Dr. Wright, who says, that the injury is not permanent; that the fractured limb will be as well in a few months as before the injury; and that in that time it will lose its susceptibility to change of atmosphere. You are bound, as this is the only evidence given as to the probable duration of this injury, to treat it as an injury not shown to be a permanent one.

The whole case, therefore, is before you. The first question, as to the plaintiff's negligence, I have charged you upon. I repeat, for the purpose merely of refreshing your minds as to the rules, that the plaintiff, (there being no evidence that he was prevented or forbidden by the conductor to get upon this platform,) if after he got upon the train and found that the first car had no accommodation for him, he had time before the train was in motion, to have gone into the rear cars to have found accommodation, and if you are satisfied that there was accommodation for him, (the notices being posted up,) then the plaintiff was guilty of that negligence which, according to the rules of law, would prevent him recovering against these companies. If, upon the contrary, you should find that he, not having been forbidden to get upon the platform of the first car, had no time before the train was in motion to seek for a seat elsewhere, then he was there lawfully and the company is not entitled to exemption from liability, merely by virtue of the provisions of the statute which exempts the liabilities of companies in certain cases. [To this the defendants' counsel excepted.] Then again, as to the liability of the defendants. There must be proved to have been a negligence upon their

parts, jointly or of either, which brought about and produced this disaster, and all the negligence which you are satisfied that they were guilty of in other respects, is to be disregarded and not taken into account by you. If you find that one was guilty and the other not, you will find in favor of the one that was not. If you find that both were culpable, you will render your verdict against both. In damages, you will allow the plaintiff for the loss of time during which he was prevented attending to his business, from the date of the disaster down to March, 1855, excluding Sundays, and you will also give him the extra one shilling which he would have earned, according to the testimony of his employer, had he not met with this accident. But you will give him, in addition to the loss of wages, the extra one shilling which, as I just observed, he now loses in consequence of the inability, superinduced by this accident, to earn the full amount which he earned before it; and you will consider also, what would be a reasonable time (treating the injury as not permanent) during which to continue this extra one shilling compensation, and then the only one other item of damage which you will be justified in giving, will be a reasonable compensation for his sufferings during the period while he was confined with this injury, and for his present sufferings, if any you suppose there to be.

Give him nothing extravagant, vindictive, or excessive in damages, but what in cool and fair judgment you yourselves, were you individually responsible here, would be willing to confess was a fair and just compensation.

General Sandford, of counsel for the Harlem Company, here submitted the following propositions, and requested the Judge to charge the same:

1. That the New Haven Company had the right, by law, to run their cars and engines over the Harlem road on this island, and the Harlem Company is not liable for any violation of the rules of the Harlem Company by the New Haven Company.

2. That the defendants, the New York and Harlem Company, are not liable, unless it is proved that some negligence of that company or its agents, occasioned plaintiff's accident.

3. That the burden of proof to show that the plaintiff's injury was occasioned by negligence of the defendants, rests upon the plaintiff.

4. That the defendants are not liable if the injury was occasioned in whole or in part by the negligence of the plaintiff.

5. That standing on the platform of a car is negligence, and declared by law to be negligence, if there was room for him inside of the cars, and the notice up.

6. That when the defendants prove that notices were habitually up in the cars for a series of years, so that daily riders always saw them, before and after the accident, the burden of proof is thrown on the plaintiff to show that they were not up that day.

7. That it was the duty of the plaintiff to take his seat in the cars at the place he got on board, if there were then vacant seats in the train, and he had that knowledge of the usual condition of the train to know where to find the vacant seats.

8. If the injury was produced in part by the negligence of the plaintiff, and in part by the negligence of either or both defendants, the plaintiff cannot recover.

He excepted to so much of the charge as related to the construction given by the court to the section of the act against riding on the platform, and its application to the facts of this case.

Mr. Noyes, of counsel for the New Haven Company, took the like exception, and submitted the like propositions to be charged with those submitted by General Sandford, with the further request to charge, that if the plaintiff knew, when he got into the Harlem cars, that there was usually room in the last two cars, and that the others were generally full, and still got on the full car, he cannot recover if the notices not to stand on the platform was duly posted in the cars at the time.

The Judge replied to both counsel, that he had already substantially charged many of the propositions proposed, and declined to charge otherwise than as he had already done; to which refusal the counsel for both defendants excepted.

The Judge then submitted to the jury, with the consent of both parties, the following questions, to which they were to give specific answers, to wit.:

1. Were printed regulations against standing upon the platform posted up, at the time when the plaintiff took his passage, in a conspicuous place inside the passenger cars?

2. Did the plaintiff know of those regulations?

3. Did the New York and Harlem Railroad Company when

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the plaintiff took his passage furnish room sufficient inside their passenger cars, then composing the train, for proper accommodation of the plaintiff within the cars?

4. Were the defendants, the two companies, or either of them, by their agents, guilty of any negligence which caused the injury to the plaintiff; and, if only one of them, which?

5. Was there sitting accommodation sufficient for the plaintiff when he got into the car at Harlem?

6. Had the plaintiff time to get such accommodation?

The jury then retired, and after being out, came in and asked the instruction of the court as to what was meant in the charge by the negligence of the plaintiff contributing to the injury sustained by him; to which the court replied as follows:

The general rule is, that the negligence of a plaintiff that goes to excuse the defendants, must be such negligence as contributed to produce the accident that caused the injury." To which the defendants' counsel duly excepted.

The jury then retired, and after an absence, rendered a verdict of \$450 against both of the defendants; and found specially, in answer to the first question, that it was not proved.

To the second question, they found in the affirmative.

To the third question, they found in the negative.

To the fourth question, they answered, Both.

To the fifth question, they answered in the affirmative.

To the sixth question, they answered in the negative.

These questions were proposed to the jury with the consent of the counsel of the respective defendants.

After the rendition of the said verdict, the court, with the consent of the counsel for both parties, made the following order:

"It is ordered that the defendants have twenty days to make a case, with liberty to turn the same into a bill of exceptions. That the case or bill of exceptions be heard at the General Term in the first instance without security, and that all proceedings on the part of the plaintiff, except in relation to the hearing of said case or bill of exceptions be stayed until the decision thereof."

This case is made by the defendants respectively, for the purpose of setting aside the said verdict and obtaining a new trial, with liberty to either party to turn the same into a bill of exceptions.

John Graham, for plaintiff.

Charles W. Sandford, for Harlem R. R. Co.

Wm. Curtis Noyes, for New Haven R. R. Co.

BY THE COURT. BOSWORTH, J.—The fourth question specially submitted to the jury was in these words:—

“Were the defendants, the two companies, or either of them, by their agents, guilty of any negligence which caused the injury to the plaintiff; and, if only one of them, which?” To this question the jury answered, “both.”

I understand the jury, by their answer to this question, to have found, that the negligence of both companies concurred to produce the collision which caused the injury.

The counsel for the New Haven Railroad Company insists that no action will lie against the defendants jointly, as the negligence of each was an independent act or omission of its own. That to maintain such an action, a single act in furtherance of a common purpose, or a single omission of duty, which was in fact joint, must be shown.

He also insists that, inasmuch as the jury have found that the negligence of the Harlem Company concurred with that of the New Haven Company to produce the collision, so that the former could not maintain an action against the latter, to recover damages resulting from the collision, the plaintiff is equally precluded from recovering for any injury inflicted on himself, on the ground that, as between the plaintiff and the New Haven Company, the car of the Harlem Company was the plaintiff's carriage, and the negligence of that company, for all the purposes of this action, is to be treated as his negligence.

The first of these two propositions challenges the right of the plaintiff to maintain an action against the defendants jointly.

The other denies all liability of the New Haven Company to the plaintiff, even though sued alone.

The complaint states, as a cause of action, that the plaintiff was injured, by such negligent management by each company of its train of cars, that the two trains came in collision, and that by such collision the injury was inflicted.

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If the views pressed upon our consideration, by the counsel of the New Haven Company, are sound, then it is obvious that the complaint could have been demurred to by that company, on the grounds:—

First. That it appeared, on the face of the complaint, that several causes of action had been improperly united, inasmuch as each of them do not affect all the parties to the action. (Code, § 144, sub. 5, and § 167, sub. 7.)

Second. That the complaint does not state facts sufficient to constitute a cause of action, in favor of the plaintiff, against the New Haven Company. (Code, § 144, sub. 6.)

The Code is explicit, that when the first objection appears on the face of the complaint, and the defendant omits to demur, he shall be deemed to have waived it. (Code, § 148.)

When two persons are made defendants, and the complaint states, as a cause of action, facts sufficient to constitute a cause of action against each, and to create, by reason of the same facts, a liability of each co-extensive with that of the other, so that the measure and rule of damages is precisely the same in the one case as in the other, and neither defendant demurs, it may be a nice question, under the Code, whether a single verdict against both would be erroneous. If the verdicts and judgments were several, and each for the same amount, and the judgment was collected in full of either company, it is not apparent on what principle such company could recover contribution from the other. If each is liable, it is not obvious that a joint verdict and judgment can operate, in legal contemplation, to the prejudice of either. (2 Kern. 580.)

If both companies are liable, but the liability is several, and if they would have had a right, if they had demurred to the complaint, to have been sued in separate actions and tried separately, yet it is undeniably true that if each company is separately liable, the liability of each arises out of the same transaction, and it is to be or may be established by precisely the same evidence in the one case as in the other. The liability is for the same injury, and arises from each defendant having so acted at the same moment of time that the action of each, though independent of that of the other, contributed to produce a catastrophe which caused the injury.

Assuming the fact, as to the concurring and contributory negligence of each defendant to be as the jury has found it, and that it has been found on proper evidence and under a correct charge to the jury, then it is evident, that in a case of the peculiar facts and circumstances of the present, it is more a matter of form than of substance, that a verdict of \$450 has been rendered against both defendants jointly, instead of a separate verdict against each for that amount.

There is no complaint made on this motion, that the damages are excessive, or that the charge to the jury, in respect to the damages, was erroneous in any particular. But, assuming that the New Haven Company is liable, is the objection well founded in fact, that a joint action is not the proper remedy, irrespective of any provision of the Code relating to the practice in such cases?

The defendants, together, caused the collision. If each company had done the acts it did, with intent to produce the collision, then, I presume, there would be no question that a joint action would lie at the suit of any party damaged directly by it. But in that case, the collision would be no more the joint act of the two than it was in the present case. On the one supposition, the result produced, that is, the collision, was intended by both; on the other supposition, it was not intended by either. If liable jointly in the former case, and not in the latter, it must be for the reason that in the one the intent to do what was done creates a joint liability, and in the other, the absence of any such intent makes the liability several.

But when a party does a wrong which causes an injury, he is liable for the consequences, whether he intended to injure any one or not. A person who negligently performs a duty, and by such negligence injures another, is guilty of a wrong, so far as the rights and remedies of parties in civil actions are concerned. When a person is prosecuted in order to recover from him the damages which his negligence has caused to another, it is no defence that negligence, or a purpose to injure, was not intended.

In this case, it is impossible to ascertain what portion of the injury was caused by the negligence of one defendant, and what portion by that of the other. The negligence of each co-operated with that of the other, and the concurring and contributory negli-

gence of both was the direct, and immediate, and sole cause of the collision, or, in other words, caused the injury.

If two persons, driving each his own carriage on a public highway in opposite directions, come in collision in consequence of each having been guilty of such negligence that neither could recover of the other, and a third person, not in either carriage, without any fault or negligence on his part, is injured by the collision, can it be doubted that he may sue the parties jointly and recover?

The injury was caused by a single act. It was caused directly by the joint action of the two; not by action had in pursuance of a common intent to cause a collision, but by action to which each was, in fact, a party.

There would seem to be no considerations of public policy or of justice to either of the defendants, requiring several actions to be brought if it be conceded that each is liable, and to precisely the same extent. The injury is single, and the immediate cause of it is a single act. The same evidence that establishes the liability of one, on such a state of facts as the jury have found, establishes that of the other. It is true, there might be a recovery against one without proving any negligence of the other, or although negligence of the other might be disproved.

If but one was guilty of negligence, when the complaint charges that the injury was caused by the concurring negligence of both, and for that reason the one free from fault is free from liability, he must be acquitted. He incurs no more hazard of not obtaining a verdict according to the evidence than any one sued with others in any action of tort does, whom the evidence is insufficient to convict of a direct or actual participation in the wrong charged. (See *Fosgate, et al. v. Herkimer Manufacturing and Hydraulic Co., and others*, 2 Kern. 580.)

In a case like the present, and on such facts as have been proved in it, I think it may be said that the collision, and not the mere negligence of the defendants, is the cause of action and ground of the defendants' liability.

It has been decided that if A accidentally drive his carriage against that of B, and the latter or his carriage is injured, trespass will lie. (*Leame v. Bray*, 3 East. 599.) So, if he drive it against one in which B is sitting, to the injury of his person, though the

latter carriage was not his property nor in his possession. (7 Taunt. 698.)

When a person is directly injured by the forcible act of another, trespass for the forcible act is a proper remedy to recover the damages caused by it. The forcible act and consequent injury constitute the cause of action. It is immaterial, so far as the question of liability is concerned, whether it was wilful, unintentional, or the result of negligence. It is enough, so far as the plaintiff's right to recover is concerned, that it cannot be justified. Whether it was wilful or unintentional may affect the measure of damages, but does not enter into the ground or reason of the defendants' liability. (*Wakeman v. Robinson*, 1 Bing. 213.)

In *Blinn v. Campbell*, (14 J. R. 432,) the court "held, that if the injury is attributable to negligence, though it were immediate, the party injured has his election, either to treat the negligence of the defendant as the cause of action, and declare in case, or to consider the act itself as the injury, and to declare in trespass."

The question was again discussed fully, in *Percival v. Hickey* (18 J. R. 257).

The action was trespass, for running down the vessel of the plaintiff at sea. The jury found for the plaintiff, and the Judge having requested, if they should so find, that they should state the grounds of their verdict, "they added, that the disaster was the result of gross negligence in the defendant."

The question whether trespass could be maintained on such a state of facts, was discussed until it was exhausted, and all the previous decisions critically reviewed. Chief-Justice Spencer, who delivered the opinion of the court, concluded with this declaration: "I am perfectly satisfied, from a review of the cases, that if the defendant is liable at all, this action is appropriate, and that it ought to have been trespass rather than case, as the injury was immediate, and from gross negligence."

The complaint of the plaintiff charges, that the collision of the two trains was caused by the negligent, reckless, careless, and wrongful management of the trains; that by reason, and in consequence of the collision so produced, the platform of the car on which the plaintiff stood, "was with great force and violence shaken, and broken, and otherwise injured, by means whereof the plaintiff was knocked or thrown down, and with such power

that his right leg was fractured between the ankle and knee, and he otherwise severely and seriously bruised and injured upon and about the body."

In brief, the complaint is, that plaintiff being a passenger in one of the trains, the defendants wrongfully run the two trains against each other with such force and violence, that the plaintiff was knocked down, his leg was fractured, and he was otherwise severely bruised and injured.

This states, as a cause of injury and ground of action, a wrongful and forcible act of the two defendants, of itself single and entire, which immediately and directly injured the plaintiff's person. Trespass would lie, for such an act, against the parties concerned in this act of force and injury.

Enough is stated to make a declaration, good in substance, in an action of trespass *vi et armis*.

Then what is the rule, as to the persons chargeable as principals, or joint trespassers, in such an action?

It cannot be stated better, or more briefly, than was done by the court in *Guille v. Swan* (19 J. R. 381-382). "Where an immediate act is done by the co-operation, or the joint action of several persons, they are all trespassers, and may be sued jointly or severally; and any one of them is liable for the injury done by all."

Without the gross negligence of each defendant, there might have been no collision, and, of course, no injury. It cannot be affirmed, from any fact found, nor be deduced clearly from the evidence, that if either of the defendants had not been guilty of negligence, there would have been a collision.

The act, which is charged as the direct cause of the injury, is the result of the co-operating action of both defendants, and without such co-operating action, might not, and, for aught we know, or can see, would not have occurred or existed.

In this respect, it differs intrinsically from the facts of some cases, which are relied upon as tests, to determine whether an action shall be joint or several.

A reference to one or two, as a specimen of the class, will suffice.

Williams v. Sheldon (10 Wend. 654) was an action against eight persons, as joint trespassers, for cutting and carrying away logs from the plaintiff's lot. One hundred and fifty logs were cut and

carried away. The jury were charged, in substance, that if they acted in concert in cutting all the logs, they were jointly liable; but if any of them were acting separately, and for themselves alone, without any concert with the others, they ought to be acquitted, and those only found guilty who were acting jointly.

If, instead of one hundred and fifty logs, only one tree had been cut, and all had been proved to be present and employed at the same time, upon the tree, in cutting it up and carrying it away, I apprehend there would be no doubt of their joint liability. If the act of trespass had been confined to a single piece of property, and all had actually co-operated in that act, no question of mental concert, or concurrence of purpose, could have been raised.

In *Auchmaty v. Ham*, (1 Denio, 495,) and *Van Steenburgh & Gray v. Tobias*, (17 Wend. 562,) the defendants were not sought to be charged for any thing done in person, or by their agents.

Two persons, each of whom owned a dog, were sued jointly, because their dogs had chased and worried a flock of sheep, and killed some of them, and injured others.

It was not the case of an immediate act, by the co-operation of two persons, or their agents, causing a direct and immediate injury to the person, or a specific and single thing, the property of another. Some of the sheep may have been bitten, or killed, solely by the one dog, and some by the other.

In the present case the cause of the injury was a single act. It was immediate, its continuance or duration was but for a moment. It was forcible and violent. The plaintiff's person was injured directly by it. The injury was caused solely by the co-operation of the two defendants in a forcible act, and so absolutely so that, without this co-operation of the two, the act itself might not, and, for aught we can see, would not have existed as a fact.

It would seem to follow that, if these two corporations were physical beings, and they had at the time done, in person, the act complained of, they might have been sued as joint trespassers. Does the fact that they acted by agents make any difference, so far as the rights and remedies of the plaintiff are concerned?

It must be remembered that the actual defendants are incorporeal beings, and can only act by agents. It is a part of the law of their being that they can act only by the instrumentality of natural persons.

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Yet it has been repeatedly adjudged that they may be sued in trover or trespass, and may be indicted. (*Beach v. The Fulton Bank*, 7 Cowen, 485; *The People v. The Corporation of Albany*, 11 Wend. 539; *Riddle v. The Proprietors of Locks, etc.*, 7 Mass. 169.) The principle settled by adjudged cases seems to be this:—

When an injury is done by the agents of corporations, in the course of their employment, by whom alone they can act at all, the corporation should be responsible, so far as concerns the rights and remedies of the injured party, when liable at all for such injuries, in the same manner as an individual. Not only in contemplation of law, but in fact, the acts of such agents are the acts of their principals. There is now no obstacle to a recovery, according to the liability arising upon the actual facts of the case, created by the mere form of an action.

The collision being the act of the two companies, and that act being forcible and without any thing to justify it, and the plaintiff having been injured directly by it, the defendants, although corporations, being liable for it, may be sued jointly, as well as natural persons.

Is the negligence of the Harlem Company to be imputed to the plaintiff, so that he cannot recover against the New Haven Company at all, provided the Harlem Company could not itself, by reason of such negligence, recover against the New Haven Company the damages which resulted to the former from the collision? The counsel of the New Haven Company insists that, the proposition that he cannot recover is sound in principle, and supported by authority. He cited, and mainly relies upon, *Thorogood v. Bryan*, (8 M. G. & S. 116,) and *Catlin v. Hills, and others*, (id. 123.)

Those cases hold that one who sustains an injury from a collision with an omnibus or vessel, cannot maintain an action against the owners of such omnibus or vessel, if negligence on the part of those having the guidance of the omnibus or vessel in which he was, at the time, a passenger, conduced to the collision.

This question is one of great importance, and was conceded in those cases to be one of novelty. The rule invoked by the New Haven Company, in its defence, if it is declared to be the law of the land, and applicable to passengers carried by incorporated railroad companies, should find in the common law some well-settled principles sufficient to uphold it.

One principle, deemed to be as well settled as any other, gives to every person injured, without fault or negligence of his own, by the negligence of another, a remedy by action to recover from him the damages sustained. Why should he lose this right, because he was, at the time, a passenger in the cars of a railroad company, whose negligence conduced to the act which caused the injury?

The railroad companies incorporated by our state legislatures are grantees of a franchise. In the view taken of them by the legislature, and by the courts, the state, as such, has an interest that the roads which they are authorized to construct, should be built and operated.

The courts have held, that the legislature, in its discretion, might justly determine, that the benefit from them to the public would be of sufficient importance to render it expedient and constitutional to authorize, in their behalf, the exercise of the right of eminent domain, and private property to be taken for their construction, on making just compensation.

It is true, that no person is under any physical necessity of travelling upon them. But the exigencies of business, for all practical purposes, make it absolutely necessary to use them. A passenger in their cars has no control of their movements. On the contrary, he is required to submit to every rule and regulation which the company, in the appropriate exercise of its discretion, prescribes for the conduct of the passengers.

I can see no reason, or consideration of public policy, which should deny to such a passenger a right of action against another person or company, by whose negligence he has been injured, solely on the ground that the company, in the cars of which he was a passenger, was also guilty of negligence, which conduced to the act, or casualty causing the injury.

If it be said, that under this rule, the New Haven Company may be compelled to pay the whole of the damages caused, in part, by the negligence of the Harlem Company, it may be answered that, under the contrary rule, the Harlem Company would be compelled to pay damages, which, but for negligence on the part of the New Haven Company, might never have been occasioned. The answer to this complaint, by either company, is, that when an injury is produced directly and immediately, by the

co-operating and concurring influence of each in wrong doing, each is liable to the injured party for the whole consequences of the wrong. Being participants in, and parties to, the wrong, the law does not, in this case, any more than in any case of pure tort, undertake to ascertain what proportion of the injury was caused by the negligence of either, and hold him responsible for that only, but, on the contrary, permits the injured party to join all the wrong-doers in one action, or to sue them separately, and, in either case, to recover the whole damages to which he has been subjected.

In point of fact, the plaintiff had no more right or power of control over the one company than over the other. Any fiction of law which imputes to him the negligence of the company, in the cars of which he was a passenger, is a satire upon its pretensions to administer justice according to the truth of the case, as disclosed by the facts which the evidence has established.

It will not be denied that if any person, not a passenger in the cars of any company, was injured by the negligence of the latter, that such negligence would not be imputed to any one, being a passenger at the time, in any such sense, as to subject him to any liability to the injured party.

Why should it be imputed to him, so as to deprive him of a right to redress against another company, for the negligence of the latter, which right would have been indisputable, if he had not been a passenger in the cars of either company?

In *Thomas v. Winchester*, (2 Seld. 397-410,) the Court of Appeals seem to have affirmed the proposition, that there is a recognized distinction between an act of negligence imminently dangerous to the lives of others and one that is not so.

In the former case, it is said that the party guilty of the negligence is liable to the party injured, whether there be a contract between them or not; in the latter, the negligent party is liable only to the person with whom he contracted.

But without attaching, so far as this question is involved, any special importance to the fact that the act of negligence, in this case, was one imminently dangerous to human life, it may be said that there is nothing in the nature of the act furnishing a distinct consideration to induce a court to adopt the rule under which the New Haven Company seeks to exonerate itself from liability.

The point now under consideration was not taken at the trial, and the record does not disclose that even the suggestion was then made that the defendant was exempt from liability on this ground. But as the Code allows the objection, that the complaint does not state facts sufficient to constitute a cause of action, to be taken in any stage of the action, the question may be raised as well on an appeal from a judgment in it as on a demurrer to the complaint. (§ 148.)

We think the rule, as the New Haven Company insists it should be declared and applied in this case, is not warranted by any considerations of public policy, and infringes the principle, that every person injured, without fault on his part, by the negligence or forcible act of another, may recover of the latter the damages sustained. That in a case like this, it is repugnant to good sense and common honesty to impute to him, for any purpose, the negligence of the railroad corporation, in the cars of which he was a passenger at the time he was injured by the collision of the cars of the two companies, a collision caused solely and directly by the concurring negligence of both companies; and the act of negligence on the part of each company being imminently dangerous to human life.

If these views are correct, the verdict should not be disturbed, unless some of the exceptions taken to the decisions of the Judge who presided at the trial require it.

With respect to the refusal to nonsuit the plaintiff, it is sufficient to say that the defendants did not choose to stand upon that exception; but, on the contrary, gave evidence in their own behalf, and no application has been made to set aside the verdict as contrary to evidence.

There was no error in denying the motion made by the New Haven Company for a separate trial, even if it be assumed that the defendants' liabilities were several. The motion was not made until the trial had progressed so far that the plaintiff had rested.

The defendants having failed to demur to the complaint, waived their right to a separate trial, even if their liabilities were several. (Code, § 144, sub. 5, § 148; Session laws of 1851, p. 889, § 172.) If the opinion already expressed, that the defendants were properly united, is correct, that of itself puts an end to the exception.

The next question relates to the offer of the New Haven Com.

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pany to demur to the evidence, and to the exception taken to the decision overruling the offer. This offer was made after the plaintiff rested, and after the Harlem Company had opened its defence to the jury, and stated that it would consist of proof that all the negligence which caused the collision was attributable to the New Haven Company.

I do not think an exception to a decision overruling an offer of a defendant to demur, made when the plaintiff rested, can be reviewed, if the party, instead of relying upon his exception, gives evidence on his part, and submits the cause to a jury upon the whole evidence. If such an exception would entitle a defendant to a new trial, provided the evidence given when the plaintiff rested and the offer to demur was made, was insufficient to entitle him to recover, this result would follow. The evidence subsequently given, and submitted to the jury under proper instructions, might require and result in a just verdict against the defendant on the merits. Then, although no improper evidence had been admitted nor any proper evidence excluded, and the cause had been correctly disposed of upon the merits, the defendant would have a new trial, because the evidence given when the plaintiff rested would have entitled the defendant to a new trial, on exception to a refusal to nonsuit, or on a demurrer to such evidence, that being the whole evidence given.

I understand it to be settled that although the Judge erroneously refuses to nonsuit when the plaintiff rests, yet, if the defendant, instead of relying on the exceptions, gives evidence on his part, the exception is waived at least to this extent, that if on the whole evidence a verdict is correctly found against him, the exception cannot be made available. After the verdict has been rendered the question is, did the whole evidence warrant the finding of the jury? Or if the motion was renewed, when all the evidence was concluded, the question might be, did the evidence justify the submission of the cause to a jury?

If a defendant insists, when the plaintiff rests, on a right to demur to the evidence, and the Judge refuses to receive the demurrer, if the defendant intends to rely on the mere refusal to receive the demurrer, as of itself sufficient to entitle him to a new trial, he should abide by his exception. If, after excepting, he gives evidence to the merits, and the jury find against him upon

the whole evidence, and properly so, the exception should be treated as having been waived, by the subsequent proceedings. The defendant has acquiesced in the sufficiency of the evidence to sustain the verdict, if an omission to move to set it aside, as being contrary to evidence, is to be deemed such an acquiescence. At all events, the verdict and an omission to move to set it aside, conclude the defendant as to the sufficiency of the evidence upon this appeal.

In *Young, et al. v. Black*, (7 Cranch, 565, Livingston & Story, J. J.,) held that it was discretionary with the Judge at the trial, whether he would compel a party to join in demurrer to the evidence or not. No cases have been cited which adjudge the point that such a refusal is error, for which a new trial would be granted.

The remaining points involve the consideration of exceptions taken to the charge of the Judge.

The jury found that the Harlem Company had caused regulations, prohibiting passengers from standing upon the platform of the cars, to be printed, that the plaintiff knew of those regulations, but that none were posted up inside of the passenger cars of this train.

The statute itself does not prevent a plaintiff from recovering merely because he stood on the platform of the car when he was injured, unless printed regulations were, at the time, posted up in a conspicuous place inside of the passenger cars then in the train, nor even in that case unless sufficient room was provided inside the passenger-cars for the proper accommodation of the passengers. (Laws of 1850, p. 234, § 46.)

If the plaintiff's right to recover of the Harlem Company is barred by the fact that he stood upon the platform, it is not because the statute creates the bar. Neither does the statute create an immunity, which would not otherwise exist, to the negligence by which a passenger is injured, unless it be the negligence of the company, in the cars of which he is a passenger. The statute is penal in its nature, and so far as it adds one to any defence furnished by the rules of common law, and adds a defence which, under those rules, would not exist, it works a forfeiture of the right to be redressed for a wrong, on a rule of decision not warranted by the principles of the common law. Such a statute should not, by construction, be extended to cases for which it does not provide.

The jury found there was sitting accommodation in the train sufficient for the plaintiff when he got into the cars at Harlem, but that he did not have time to get such accommodation before the collision; or, perhaps, I should say before the train was put in motion.

No motion having been made to interfere with the verdict, as being contrary to the evidence, we must regard it as a true record of the actual facts as specially found. If these facts entitle the plaintiff to recover, the judgment must be affirmed, unless the court erred in its instructions to the jury, in stating rules by which they were to be governed in finding these particular facts.

No exception was taken to the charge in respect to the matter of damages, and no complaint has been made against it on the argument of this appeal. The portions of the charge complained of relate to the plaintiff's right to recover at all, and not to the measure of compensation, if enough was proved to justify a verdict in his favor.

I think it will be difficult to lay a finger on any passage of the charge which could have operated to the prejudice of either defendant with the jury in determining either of the six several questions to which they were requested to return, and did return, a specific answer.

The portions of the charge to which exception was taken, relate to the construction of the statute in relation to the posting of notices inside of the cars, and to the manner in which the rule was stated as to what was such negligence of the plaintiff as would preclude him from recovering.

The Judge, after having presented his views at length, stated them in a condensed form, and on such statement submitted the cause to the jury.

He commenced with the remark, that there was no evidence that the plaintiff was prevented or forbidden by the conductor to get upon the platform. This was not excepted to, and must be taken to be true. The Judge then told the jury, that if the plaintiff, after he got upon the train, and found that the first car had no accommodation for him, had time, before the train was in motion, to have found accommodation, he was guilty of negligence which would bar a recovery, provided there was, in fact, sufficient accommodation for him, and the notices authorized by

the statute were posted up. I think it quite clear that the defendants have no ground to complain of this part of the charge. But if he had no time to seek for a seat elsewhere before the train was in motion, then, not having been forbidden by the conductor to stand upon the platform, he was there lawfully, and the statute could not operate to exempt the defendants from liability. To this the defendants excepted.

How some of the facts involved in these propositions were found by the jury appears by the special verdict. They found that no notices were posted up, and that the plaintiff had no time, before the train started, to seek a seat in another car. The charge assumes as an incontestible fact, that the car on the platform of which he was standing, had no inside accommodation for him, and asserts, without objection from either defendant, that the conductor neither forbid, nor attempted to prevent, his standing on the platform.

Unless the mere fact of being on the platform, under such a state of facts as exists in this case, is, *per se*, such negligence as disentitles the plaintiff to prosecute, then there was no error in this part of the charge.

There is no pretence that the plaintiff had the slightest reason to suppose that any cars of the New Haven Company were, or might be, on the track ahead of him, while some of the officers of the Harlem Company knew it, and if they had done their duty, they would have communicated this knowledge to the conductor of this train at the last stopping-place prior to the collision. The plaintiff had no knowledge of any fact or circumstance which should have induced the most cautious and prudent man to guard against the occurrence or consequences of any disaster, except some one which might possibly result from the negligence of the Harlem Company.

The negligence of the plaintiff in getting upon this car rather than upon another, or standing upon the platform when the car was full inside, and was put under motion before he had time to seek for a seat elsewhere, is not alone such negligence as bars his right to recover.

In the case of *Carroll v. The N. Y. and N. H. R. R. Co.*, (1 Duer, 579,) the defendant's counsel requested the court to charge the jury, that "if they believed that the plaintiff, by riding in the baggage car,

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increased the risk of injury to himself, and this was negligence which contributed to the injury plaintiff suffered, he cannot recover, although he had no agency in producing the collision. The Judge refused to so charge, but charged that, "The plaintiff here did not contribute to produce the collision itself, and there was not, therefore, such negligence on his part as will defeat the action."

"If the plaintiff was there with the assent of the conductor, notwithstanding the notice, he was not in fault, unless he was guilty of negligence which concurred directly in producing the injury." "That the negligence of the plaintiff, however, must concur directly, not remotely, in producing the accident or injury."

This court held that the Judge committed no error in refusing to charge as requested, or in the charge that was made. The judgment of this court has been affirmed by the Court of Appeals.

In the case before us the Judge charged, that standing upon the platform of the car had no effect in producing the collision by which the injury was effected. That the mere fact of standing upon the platform was not, of itself, a defence to the action. To this part of the charge the defendants excepted.

The collision was the proximate, direct, immediate and sole cause of the injury. It is true, if the plaintiff had not been within the reach of its influence he would not have been injured. But, on the facts as found, he was in no sense in fault, as between him and either defendant, in being where he was. He was not, as to either of them, wrongfully there. He owed no duty to either of them which required him to be elsewhere. If he had been off of the train the collision would have occurred.

His being where he was, not being wrongful as to either defendant, nor a failure to perform any duty which he owed to either of them, it is no defence to an action brought to recover damages caused by their negligence, that the position, in the event of such negligence, a negligence which no one could foresee or had the slightest reason to anticipate, was one of more danger than a seat in one of the cars, and that if he had been seated he might not have been injured.

The law looks to the proximate cause of the injury. When a plaintiff did nothing which conduced to that, and at the time of its occurrence, he is lawfully in the position which he occupies,

and there is no negligence in not anticipating or foreseeing the possibility of an injury from the negligence of others which, if it should occur, would endanger his safety in any part of the train, and it is by such negligence that he is injured, then there is no negligence on his part, in the legal sense of the term, which contributed to the accident or to injure him. (5 Denio, 266-7.)

I think there is nothing in that part of the charge, relating to the subject of the plaintiff's negligence, which, in contemplation of law, tended to prejudice the rights of either defendant. In determining this question, the facts which the jury have specially found, and which this appeal concedes to have been properly found, must be kept in mind. And unless, upon such conceded facts, this part of the charge may have produced a general verdict contrary to law, it will not entitle the defendants to a new trial.

I think the Judge would have been correct in instructing the jury that, as matter of law, the plaintiff was entitled to recover, if they found that he was injured directly by the collision, and that this collision was produced solely and immediately by the concurring and co-operating negligence of both defendants, provided they should also find that no notices were posted up inside of the cars, and the car on which he entered had no accommodations for him inside of it, and the train started before he had time to seek for a seat in another car, and the conductor knew of, and did not object to, his standing on the platform. (I include all these facts in this proposition because they are all established in this case.) That, on such a state of facts, the mere circumstance that he stood upon the platform at the time of the collision, would not of itself be such negligence on his part, as would be a bar to his right to recover.

Whether this proposition be a sound one, seems to me, to be the only question which the case presents, in relation to the subject of the actual liability of the defendants. Whether their liability, if it exists, is joint or several, is a different question, and has been already considered.

As to the negligence of the defendants, the Judge charged that, they "are liable only in case the disaster was produced by their own negligence. Negligence having no connection with the disaster is not to be regarded in this action. The defendants can be held jointly liable only in case the negligence was joint. If either

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was innocent of any fault contributing to the disaster, your verdict must be for that defendant; if both were innocent, your verdict must be for both defendants."

Independent of the question, whether joint negligence is predicable of such a state of facts, and which has been already discussed, I think the question as to the several liability of either, or neither, of the defendants, was properly submitted to the jury.

This collision occurred at about 6 o'clock A. M., of the 22d of November, 1854. This freight train of the New Haven Company was due at the Centre street depot, at 15 minutes past 11 o'clock, P. M., of the preceding day. By its general regulations and time-tables, fixing the time of the departure and arrival of each of its trains, the New Haven Company notified the public that, between 11.15 P. M. of one day and 7 A. M. of the next day, none of its trains would be on this track of the road between Harlem and New York.

Any passenger in any Harlem train, from Harlem to New York, running at 6 A. M., was under no obligation, and owed no duty to the New Haven Company, requiring him to ride in one part of the train rather than another, in anticipation that a train of the New Haven Company, due in the city of New York at 11.15 P. M. of the 21st of November, might, at 6 A. M. of the following day, not only be on the down track of this part of the road, but, also, that it might be under such negligent management, as to render it not improbable that there might be a collision between it and the cars of the Harlem Company, in which he was a passenger.

So long as this passenger was lawfully where he was, as between himself and both companies, and as the exercise of ordinary care on their part, and a performance of the duty which each company owed to all the passengers on this road, would have prevented a collision, and there was no fault on the part of the plaintiff in not anticipating such a collision, or in seeking a seat with reference to its possible occurrence, it should be held, as I think, as matter of law, that the fact that the plaintiff was on the platform at the time of the collision is no bar to the action.

Negligence of a plaintiff which "contributed to the injury complained of," and negligence which contributed "to produce the casualty or occurrence which caused the injury," are, in most

cases, equivalent expressions. In reference to the facts of this case, the latter mode of expression, correctly expressed the rule which should have been stated to the jury. (*Carroll v. New Haven R. R. Co.*, 1 Duer, 571.)

There must be a judgment for the plaintiff on the verdict.

WOODRUFF, J. (Dissenting.)—While I concur fully in the conclusions at which my brethren have arrived upon several of the questions raised by the appeal in this case, there are others which are essential to the maintenance of the verdict herein from which I am constrained to dissent.

It is undoubtedly settled, by the decision of the Court of Appeals in *Fosgate, et al. v. The Herkimer Manufacturing Co., et al.*, (2 Kernan, 580,) that the improper joinder of parties defendants, or of causes of action, must be taken advantage of by demurrer, or by an answer which raises the question of joint or several liability, or it will be deemed waived. The case cited was an action of ejectment and the complaint charged that the defendants "unjustly withheld from the plaintiffs the possession of the premises," etc. The answer denied "that the defendants, or any of them, unjustly withheld from the plaintiffs the possession of the premises or any part thereof." The verdict found this issue in favor of the plaintiff, and the judgment properly followed the issue which the defendants had by one answer jointly raised. They had voluntarily rested their defence upon the question whether the defendants, or any of them, unjustly withheld from the plaintiffs the possession of the premises, and the jury found that they did so withhold, etc., and the court held that although upon the evidence each defendant may have been only liable in respect to such portions of the premises as he occupied in severalty, yet that, under those pleadings, proof that the defendants occupied in severalty was immaterial and irrelevant to any issue. They had rested their defence, not upon the nature or extent of their several occupation, but upon the denial that they, or any of them, withheld the possession, etc.

If the verdict in the present case, under the rulings had at the trial, can be brought within the rule established by that decision, then of course we should, so far as the objection herein rests upon

mere misjoinder of parties to the action, or of causes of action, order judgment for the plaintiff upon the verdict.

But where the complaint alleges facts which, if true, create two causes of action, upon one of which only each defendant is severally liable, and the defendants severally put in issue the facts charged, so far as they are respectively affected thereby, it does not follow, from the decision referred to, that each is to be charged with liability upon both causes of action. The omission to object, by answer or demurrer, that there is a misjoinder of parties, or of causes of action, will prevent their raising that objection at the trial, but it does not subject either to a recovery against himself upon and for the several liability of the other.

When the liability charged in the complaint is charged upon both as a joint liability, and they think proper to unite in an answer denying that they or either of them are liable, they may, as in the case referred to, preclude themselves from entering at all upon the question, whether their liability is several or not, but this, at the utmost, is the extent to which, as I think, the court of appeals intended to go in their decision.

Suppose, for example, two are sued as makers respectively of two promissory notes, one signed by each, and they severally deny the making thereof, not having objected, by answer or demurrer, that they or the causes of action ought not to have been joined in one action, perhaps the plaintiff may proceed to trial and have judgment against each for the amount of the note made by himself. But surely the omission to demur or set up the misjoinder by answer, does not warrant the judgment against either for the amount of the note made only by the other. The rulings at the trial, the instructions to the jury, and the judgment rendered, must be according to the several liability of each.

This illustration may or may not be like the case disclosed in the pleadings and by the evidence on the trial of the present action. I give it for the purpose of stating the principle involved in it—whether the principle, if correct, has any application to the case before us may be hereafter considered—and I, therefore, add that where the pleadings and proofs disclose a state of facts upon which the defendants are only severally liable for their own separate acts or defaults, and neither for the acts or defaults of the other, and the defendants answer separately, denying each on his

own behalf his liability for the causes alleged, it is erroneous to charge upon each a responsibility for the acts or defaults of the other, and proceed on the trial, in the verdict and by the judgment, as if they were jointly liable.

It is true that if, in the case before us, it shall appear that whether severally or jointly liable, each is necessarily liable, if at all, to precisely the same extent, and for the very same amount of damages, the question will become a question of form only in respect to this particular instance, except so far as the defendants were involved in a conflict with each other, which placed both defendants at disadvantage on the trial, and gave the plaintiff an opportunity to profit by the efforts of each defendant to charge the co-defendant with liability for the matter complained of. Whether the court can say that the effect of this conflict was any thing more than to develop the whole truth, it is not necessary, under the views I entertain of the other questions involved, for me to say. But if the liability of each defendant is precisely the same in extent and as to amount, and if for that reason the objection is wholly immaterial because no injustice is done, it should be disposed of as a question of form only. The substantial principle involved should be at least rightly stated and the correct rule recognized.

And on the other hand, if in this case both defendants, though only severally liable, have in truth been treated as liable for the acts or defaults of each; and under the evidence they are not, as matter of law, necessarily liable to the same extent and for the very same sum as damages, and especially if there are facts which tended to show that one of the defendants was not liable at all, or that the one was liable on grounds which did not affect the other, and for which such other was not responsible; then the question whether the liability is joint or only several, becomes not only important in principle, but material to the defendants and vital to the maintenance of the verdict.

There are considerations which will be suggested tending to this view of the defendant's situation in reference to the present verdict, and which have led me to the conclusion that if the defendants are not jointly liable, the verdict should be set aside, and so far as the conclusion of my brethren rests upon the ground that the defendants are so liable, it is to that extent, at least, an

important inquiry, vital, as I think, to the decision of the case before us.

After careful reflection, I am constrained to say, that upon the facts in this case, a joint action against these defendants cannot be maintained.

A fundamental principle lies at the foundation of all joint liability, and that principle is, that each of the parties charged is liable for the act or default of the other. This is no more and no less true in reference to joint liability in actions *ex contractu* than in those *ex delicto*; in the former these parties are liable upon the same grounds, and for or in respect to the identical cause, and to the same extent.

And in actions *ex delicto* it is of the essence of joint liability, that the acts or defaults of each defendant are imputed to the other, as effectively for all purposes, as if they were the acts or defaults of himself; and the liability of each for the acts or defaults of the other, enters not merely into the extent of the liability of each, but into the very basis and ground of such liability.

And as respects the ground of liability in its bearing upon the question whether two parties are jointly liable, it makes no difference whether the action be trespass *vi et armis* (formerly so called) or trespass on the case for consequential damages. In the former case, each must be liable for the trespass which the other has committed, *i. e.*, each must be liable for the other's act. In the latter case, each must be liable for and in respect of the act or default of the other, from which the consequential damages have resulted.

It is in the very elements which constitute a joint liability, that the case before us is deficient.

There is nothing in the relation which the defendants bear to each other or to the present plaintiff, or to the injury which he has sustained, or to the cause of such injury, that subjects them to a joint action.

All that can be truly said, in my opinion, of the defendants is, that each company is liable for its own acts or defaults, or the acts or defaults of its own servants.

The very basis and ground of action here, is the negligence of the defendants' servants. By whatever name the action be called, (with reference to our former legal nomenclature,) whether trespass

or case, it is the negligence of their servants alone that makes the defendants liable at all. Had there been no negligence there would be no right of action. Even if the collision, with all its consequences to the plaintiff, had happened, there would have been no liability without such negligence.

Now, however difficult to separate the consequences of the separate negligence of either defendant, yet each is liable, or responsible, in respect of its own negligence, and for its own negligence only.

The relation of the two companies to the plaintiff and to the alleged wrong are wholly different, and exhibit the defendants in an entirely several or separate character.

A mutual violation of a joint duty makes both parties liable, and each liable for such violation by the other.

Now there was no joint duty. The duty of the New York and Harlem Railroad Co. to the plaintiff arose from their undertaking to carry him. The only duty owed to him by the New York and New Haven R. R. Co., was a duty which they owed to all mankind, so to conduct their business that no one should be injured by their culpable act or neglect. *Did they owe it to him any the less because they owed it to others also?*

The nature and extent of the duties of the companies respectively was different. The New York and Harlem R. R. Co. was bound to exercise the highest prudence, and the utmost care and skill, which was, under the circumstances, practicable, and which the most prudent person would use for the safety of those entrusted to them for carriage.

The New York and New Haven R. R. Co. were only bound (in their relation to the present plaintiff,) to exercise ordinary care and prudence, in view of the nature of the business in which they were engaged, and the circumstances in which they were acting.

So, also, defendants uniting in a joint act are liable jointly for the injury caused thereby.

But if there be no common purpose, the act is not joint unless there is an actual union of the parties in the act complained of; indeed, the actual union of the parties in the act complained of, in general creates a joint liability, because such actual union is evidence of the common intent. But if it were conceded that in such case it would be none the less joint because there was no intent to do the act, when, in truth the act is single, and both parties act

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together in it, still, if such a case can be supposed, it would fail to illustrate the present case, for here it is not an act, but a neglect, that constitutes the ground of liability. In this there is no union of the parties if the common intent be wanting.

The neglect of the one company is not here the neglect of the other; nor had the one any agency in producing the neglect of the other. The negligence of either is, as a ground of liability, entirely independent of the other, not causing, nor tending to cause, the negligence of the other.

If either are liable for the collision and its consequences, it is not because the collision and its consequences are a ground of legal liability, but because the collision resulted from the negligence—that, and that only, being the ground of liability. The circumstance that the consequence of the several neglect of the two defendants produced one result, to wit, the collision, is a merely incidental and casual coincidence, and does not alter the nature or essential character of the cause to which the liability is to be referred.

So there is joint liability for an act or acts done by each in furtherance of a common purpose. This is clearly so when there is a common intent to injure. It may, however, be conceded that, (even in the absence of an intent to injure) the liability is joint if the injury result from an act or acts done in execution of their concurring intent to do, or to omit to do, precisely what was done or omitted. Here no such ground of liability is even claimed. Each company was prosecuting its own separate business, with wholly distinct and unconnected purposes, in no wise contemplating the act or default of the other, and, indeed, in ignorance of the acts or neglects of the other, until every thing had been done or neglected which involves them in liability at all.

Again, there may be a joint liability for the negligence of either, when both are at the same time engaged together, each contributing to the accomplishment of a common design. It is not necessary to seek illustrations of this proposition or to define strictly the narrow limits to which it must be confined. Instances might be suggested that would come within the definition, and yet in which such joint liability would not result, and others in which it would clearly follow. But here there is no claim, and can be none, that there was any common intent or purpose whatever.

In the cases above supposed, the defendants are mentioned as if acting or neglecting in their very persons, and not by agents or servants; and in some of the cases stated there might be no liability at all by the principal, for the acts supposed, if done by servants; but it is not material to my purpose to discriminate, as the propositions are stated merely to define the ground of joint liability and the contrary.

Here, the ground of the liability of each being negligence, each is liable for the fault of their own servants, and only for such fault.

And the companies were acting wholly independently of each other.

They were not discharging any common obligation to the plaintiff.

They violated no common duty.

The fallacy in the claim that the liability is joint results from regarding the collision as the ground upon which the defendants are to be charged. It is not in respect of the collision, which is itself a consequence, but in respect of the negligence that caused a collision, that either are liable.

The *culpa causans* is separate in respect to each, and whether injury results concurrently or not, cannot change their relation to each other. The fact of liability for the consequence exists, in a strictly logical sense, prior to the consequences themselves. The consequences are only considered in determining to whom and to what extent that liability subjects them.

The fallacy is rendered more easy of adoption from what is the peculiarity and only incidental feature of the present case, viz., that the injury sustained by the plaintiff is single, so that it is impossible to say how much of the injury resulted from the negligence of the one company, and how much from that of the other. This, certainly, cannot alter the principle upon which the liability of the parties depends. Its only result may be, that in an action against either, the defendant may, *ex necessitate* be subjected to the whole consequences of the occurrence.

Suppose that, instead of injuring a person, the respective colliding trains had, upon the occasion in question, injured some inanimate object of value interposed between them, but so that the injury received from the force of the one train could be distin-

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guished from the injury received from the force of the other. Can it be doubted that each company would be liable for the injury done by its own train, and for that injury alone? I think not.

Each would be liable for negligently and violently running its train against the object injured, and for the injury thus produced. In principle, I think the present case is not different.

In neither case is either liable for the negligence of the other, nor, in principle, for the consequences of the negligence of the other.

The views above expressed find corroboration in some cases, which I mention briefly:

In *Guille v. Swan* (19 J. R. 381) the defendant, an aeronaut, had ascended in a balloon, and descended into the plaintiff's garden. When he descended his body was hanging out of the car in great peril, and he called for help in a voice audible to the crowd, who were pursuing. They broke down the plaintiff's fences, and came to the defendant's relief, doing damage; and the defendant was held liable for the whole trespass. The court, denying that the defendant was free from liability for the acts of the crowd, merely because he did not intend that they should commit the trespass, or because his descent in that place, and its consequences, were wholly involuntary, say, "To render one man liable, in trespass, for the acts of others, it must appear either that they acted in concert, or that the act of the individual sought to be charged ordinarily and naturally produced the acts of the others."

In *Williams v. Sheldon*, (10 Wend. 654,) which was an action against eight defendants, for cutting and carrying away logs from plaintiff's lot, there was evidence to show that the defendants did not all work together, nor share alike in the profits of the spoliation. The rule of liability governing the case is declared to be this: "To entitle the plaintiff to recover against all the defendants as joint trespassers, it must appear that they acted in concert in committing the trespass; if some aided and assisted the others,—or some employed the others—or assented to the trespass committed by the others, having an interest therein, all are jointly guilty. But if any were acting separately, and for themselves alone, they are not jointly liable with the others."

The case of *Van Steenburgh, et al. v. Tobias*, (17 Wend. 562,) and *Auchmaty v. Ham*, (1 Denio, 495,) appear to me to bear very strongly upon the case under consideration. The first was an ac-

tion against two defendants, each of whom was owner of a dog, to recover against them jointly for the injuries done by the two dogs to the plaintiff's sheep. The injury was done by the two dogs at the same time, both uniting in the mischief. The court held that the action would not lie; that the case showed only a separate trespass, or wrong, against each defendant's dog.

The case of *Russell v. Tomlinson, et al.*, (2 Conn. 206,) precisely similar, is cited with approbation, and the language of the court in that case is adopted: "Owners are responsible for the mischief done by their dogs, but no man can be liable for the mischief done by the dog of another, unless he had some agency in causing the dog to do it. Each owner is liable for the mischief done by his own dog."

In *Auchmaty v. Ham*, the Judge at the trial had charged that the defendant was liable for the injury done by two dogs, though he was the owner of one only. The judgment was reversed, and the court held that each owner is only responsible for the mischief done by his own dog. They notice a feature in the case which is also characteristic of the case now under consideration, and refer with approbation to the above cases, and to *Adams v. Hall*, (2 Verm. R. 9,) where they say "the difficulty in ascertaining the proportion of damage done by each dog, furnishes no reason why one man should be accountable for the mischief done by the dog of another."

It is a familiar and well-settled rule, that a joint action cannot be maintained against two for slander, by words spoken by each. And yet, if the concurrence of the two acts, or neglects, complained of, and the difficulty of separating the injury produced by each, so as to say how much of the damage was imputable to either, were any sufficient reason for making the liability joint, it would be easy to suggest many cases of slander, under circumstances that would warrant its action; for when there be slander by several, it may be wholly impracticable to determine how much of the injury which is sustained in loss of good name results from the slander by one, or how much by the slander of the other; and it is generally clear, that when two or more conspire together to injure another, by defaming his character, they become jointly liable. Each is liable for the act of the other, done in pursuance of the common intent. This distinction in reference

to slander by two or more, illustrates the proposition that, when the acts are several, the liability depends upon the question whether there is a common intent or purpose.

Suppose two separately and falsely represent a person to another as worthy of credit; in reliance upon the representation of both, he sells such person goods; and suppose it be true that no such sale would have been made had not the representation by the one been corroborated by the like representation by the other, I deem it quite clear that no joint action will lie, without proof that the defendants conspired together to procure the credit, and effect the deceit.

In what I have said in relation to the necessity of showing a concurring purpose to sustain a joint action against the defendants, it is not intended to insist that where two or more unite in an act of trespass, the motive or intent with which they commit the act is material. The act may be committed in the belief that what is done is lawful, and be none the less a joint trespass, and, in the language of the court in *Guille v. Swan*, above cited, "where an immediate act is done by the co-operation or the joint act of several persons, they are all trespassers and may be sued jointly or severally, and any one of them is liable for the injury done by all;" and although, in that case, the defendant was held liable for the acts of others, though wholly without wrongful intention on his part, it was because his act would ordinarily and naturally produce, and did produce, the acts of the others.

In the present case the liability of neither defendant is founded in any act of the defendants or of either of them, but in negligence only, and the negligence of either in nowise tended to produce negligence in the other.

It is, doubtless, true that when a negligent act is the immediate and direct cause of an injury, the action of trespass *vi et armis* would lie. It was so held in *Percival v. Hickey* (18 J. R. 257). That was a case of gross negligence on the part of the defendant in person, in running down the plaintiff's vessel; but allowing to a plaintiff that form of action did not change the essential ground of the defendant's liability. That was his negligence, without that he was not liable, although the plaintiff's vessel was run down. In order of proof it might be sufficient to show that his vessel was run down by another in the charge of the defendant. But when

all the facts were developed, the defendant's liability, in which ever form the action was brought, rested on his negligence in managing his vessel.

It in nowise follows that if the negligence of another person in managing another vessel, wholly independent of the first, without any common purpose, concert or connection, had, by mere coincidence, contributed to the disaster, a joint action of trespass or a joint action in any form could have been sustained against them.

It is by treating the collision as the forcible act warranting the action of trespass, and the defendants as actors in the collision itself, that it seems plausible to say the defendants have co-operated in producing the injury and are, therefore, jointly liable. I have already said that to say that either defendant is liable to this plaintiff, on the ground that their trains collided, is fallacious. They are liable, if at all, because, and only because, of their several negligence, which resulted in the collision, and in that negligence there was not any community between them. Besides this, the case referred to, and those cited therein, which authorize a plaintiff, at his election, to sue in case for consequential damages for the negligence, or in trespass for the direct and immediate cause of injury, are cases where, in truth, the defendant was present acting in the very matter, and if not so present, but the act resulted only from the negligence of his servant, case only would lie against him.

In every aspect of the rule, it seems to me that whatever form of remedy may be resorted to, it is negligence only which is the ground of his liability. But the suggestion last made brings into view another reason for denying the liability of the defendants to a joint action, which is quite conclusive, and this is that in an action against a master for an injury resulting from the negligence of his servant, no action of trespass would lie. The action is for consequential damage, and is founded in negligence only. The case last above referred to exhibits this rule in many of the cases mentioned therein, and others might, if necessary, be added. It is not obvious to my mind that one master under the form of a joint action can be made liable for the negligence of another man's servant, over whom he has no control, whom he has not selected, with whom he has (in the matter in which the servants are employed) no connection, and whom but for the negligence of his

own servant there could be no pretence that he was liable for that of the other.

I can understand how a man may be properly responsible for the negligence of his own servant and for all its consequences, but that the coincidence of that negligence, with the negligence of another man's servant, should make him responsible for the negligence of the latter, as if the action be joint he must be, I do not understand and cannot concede.

True it has been held that a corporation is, in some cases, liable in trespass, for acts which, in one sense, it does by its servant. So may an individual be liable in trespass for acts of his servants, done by his command or in which he aided, or for trespasses which are the immediate and direct consequence of the servant's obedience.

A corporation can, in one sense, only act by agents and servants; but it can and does exercise strictly corporate acts, and in them it acts or speaks as truly as does an individual in his proper person, and for them if done or authorized to be done it will be liable as an individual is liable. Whatever, in the mode the law of its organization prescribes, the corporation does or authorizes, is the act of the corporation itself, and may doubtless be the subject of the same modes of redress as if it were the act of an individual.

But the negligence of its servants is not such an act; if it be conceded that they are liable as an individual would be under like circumstances, it proves nothing in this case, for, as above suggested, the ground of the liability of an individual, would be that as master he is liable, consequently, for and because of the negligence of his servant, and only upon that ground; and the observation therefore recurs, they are not liable for the negligence of the servants of another corporation, pursuing a distinct, independent employment, engaged in the performance of a separate duty, with whom they have no connection, and over whom they have no manner of control.

I am aware that ingenuity might suggest examples in which it would be difficult to say whether the liability of two persons is joint or only several, or rather cases, where the only proofs which could probably be given, would render it difficult to apply this rule. As where two men, each in pursuit of his own private revenge, or for the gratification of his own malice, strike another

at the same time, without concert or even knowledge of the other's intention; or two men at the same moment apply fire to another's house in different places, each in like ignorance of the acts or doings of the other, and it burns down. Other examples might be suggested, and often the coincidence of time, place, and act, would raise a presumption of a common purpose; and it may often, where the acts are clearly several, be practically impossible to say exactly how much damage is caused by the wrong of one defendant and how much by the fault of the other.

But such cases furnish no reason for a departure from principle.

I cannot resist the conclusion that a joint verdict against the present defendants cannot, or I should more properly say, ought not to be sustained.

I cannot concur in the opinion that the Judge was correct in charging that "the negligence of a plaintiff that goes to excuse the defendants, must be such negligence as contributed to the accident that caused the injury."

In another form the proposition is stated thus: "the general rule is, that where a party by his own negligence contributes to bring about the occurrence by which the injury is effected, he cannot recover;" and lest the meaning of "occurrence" should be misunderstood in this instruction, it is added by way of explicit direction, "standing on the platform of the car could in itself have had no effect in producing the collision by which this injury was effected; of itself, therefore, it would be no defence to the company in case of an accident occurring."

By this, the jury were given to understand, that however gross the negligence of a person may be in exposing himself to injury, if that negligence does not contribute to the other cause of injury, it is no bar to the plaintiff's recovery, however true it may be that if the plaintiff had exercised ordinary care he would have received no injury.

I do not so understand this rule; examples may be suggested which illustrate its error.

A foot passenger in the streets of a city, where the sidewalk is safe and convenient, voluntarily exposes himself by walking in the carriage-way; another negligently leaves his horse unattended and ill secured. The horse runs away and overturns a vehicle

upon the negligent passenger, who is unconscious of his approach. The negligence of the latter neither causes nor contributes to the running away of the horse nor to the overturning of the vehicle: can he recover damages for his injury?

Again, while thus carelessly passing along the street, in utter disregard of the dictates of ordinary prudence, two vehicles, by the negligence of some other persons, are brought in collision, and he is injured, by the overturning of one vehicle, or by its being thrown against him. His being in the carriage-way "could in itself have had no effect in producing the collision by which the injury was effected." Does it, therefore, form no obstacle to a recovery of damages?

Again, one is loitering carelessly upon and about the tracks of a railroad, when, by some negligence, a car is overturned upon him. Such negligence of the victim certainly does not contribute to the accident, in the sense in which the term accident is used in this charge; it did not produce, nor tend to produce, the overturning of the car; does it furnish no reason for leaving him to bear the consequences of his own folly?

I apprehend the inquiry is, whether his injury is attributable to his own carelessness; whether his negligence contributed to his hurt?

The relative duties which mankind owe to each other, do not proceed upon the idea that any are infallible. All may err; and no one should ask indemnity against his neighbor's unintentional mistake, where, but for his own carelessness, he would not have been injured thereby.

In the case under consideration what caused the injury? Not the negligence of the one defendant alone. But for the negligence of the other, there had been no accident. Not the collision alone, (if the plaintiff's standing on the platform was negligence,) for if the plaintiff had exercised ordinary prudence, he would have received no harm.

The plaintiff here says, and the charge adopts his claim, "No matter how negligent I was, if there had been no collision I should not have been hurt, and I did nothing tending to produce a collision."

The New Haven R. R. Co. may retort with equal plausibility, no matter how negligent we were, if you had not been upon the

platform you would have sustained no damage, and we in nowise consented or contributed to your needless exposure to injury.

The causes of this injury are threefold. If it was an act of negligence in the plaintiff to ride upon the platform, there were three parties contributing to the injury. The injury may, with equal propriety, be said to be the consequence of the negligence of either, and it was clearly the result of all combined.

It is claimed that, even if there be inaccuracy in the instruction referred to, the special finding of the jury relieves the case from any claim that injustice was done to the defendant, by rendering the same result inevitable had the charge, in this particular, been free from liability to criticism. That the jury have found that there was no seat for the plaintiff inside the car on which he stood, and no time was afforded him, after he got upon the platform, to find a seat in another; and, under the general instructions in the charge, the jury may be assumed to have found that he was not forbidden to stand where he was. I admit that there is force in this suggestion; but there was evidence tending to show that, in truth, these facts had nothing to do with the conduct of the plaintiff in this respect. The defendants gave evidence that the plaintiff was a commuter—a “constant rider”—that the front car was usually full when the train reached the station at which he was in the habit of getting on; that there was room in the rear car; that he was in the habit of riding on the platform daily. The inference from the evidence is very strong, that he rode there from no necessity, but from choice—from a foolish desire to be on the foremost car at all hazard.

It by no means follows from the verdict that he had not abundant reason, from the habitual state of the train in which he daily visited the city, and the usual course of filling the forward cars before his station was reached, to know that there was room enough (as in fact there was) in the rear cars; nor that he had not time enough, and opportunity enough, to have entered those cars at the station where he got upon that train. The request of the defendants to the Judge, to charge that it was his duty to do so, if he had that knowledge of the usual condition of the train to know where to find the vacant seats, seems to me reasonable, and that the defendants might require such instruction to be given.

It is suggested that the case of *Carroll v. The New York and*
D.—VI.

Colegrove v. Harlem and New Haven R. R. Co's

New Haven R. R. Co., sustains the views expressed in the charge in this case. Doubtless there are some things in the opinion in the case which seem to conflict with the views I have expressed. That case does not, I think, go so far as the propositions I have been considering. That case rested, in no slight degree, upon the supposed consent of the defendants to the plaintiff's riding in the baggage car. The defendants are deemed not only to have waived the benefit of the statute, but to have virtually conceded to the plaintiff the propriety of his riding in the place and manner in which he was riding.

Perhaps a still more important feature in that case was, that in the conduct of the defendants' servants there was gross negligence, and not only gross negligence in itself, but towards a person to whom they were under a clear legal duty to exercise the utmost care and caution; and the collision arose from two trains of the same company, running in opposite directions, coming in contact.

I by no means insist that the want of ordinary care on the part of a passenger will justify or relieve a railroad company from liability for gross neglect, evincing a reckless or wanton disregard for the life or safety of their passengers.

In the aspect last suggested, the case of *Carroll v. The New Haven and New York R. R. Co.* is not in principle unlike the more recent case of *Williams v. The New York and Harlem R. R. Co.*, in which it was held, in the Court of Appeals, that even though the plaintiff had carelessly gone upon their track, or had, through negligence, fallen thereon, it was not error to charge that "if the driver could have stopped the car before it went over him, the plaintiff was entitled to recover." In that case, the proof was clear that the driver saw him; and the court held, that his neglect to stop the car, when it was in his power to do so, after he saw the peril to which the plaintiff was exposed, was an act of gross, wanton, and even reckless disregard of human life and safety, and could not be excused by the imputation of negligence to the plaintiff.

With the principle of these cases, my view of the question in this case does not conflict. There is here, upon the evidence, no just ground for imputing gross negligence to the defendants. The case was not submitted to the jury upon any such idea; and the general doctrine that, in the absence of gross negligence, the plaintiff, in order to recover, must be clear of any negligence on his

own part contributing to the injury complained of, is not at all questioned in the case last referred to.

The considerations which appear to have influenced the charge to the jury, here arising from the omission of defendants (the Harlem Company,) to post the notices required by the statute in the passenger cars; their neglect to delay at the station where the plaintiff entered the train till he was provided with a seat; their omission to furnish proper and suitable accommodations for the plaintiff inside the cars, were all presented to the jury as material questions affecting the defendants' liability, and connected with them was the duty of that company to exercise the utmost care and prudence to protect their passengers; and these considerations are, in effect, made to bear directly upon the question of the liability of the other defendant, who had no concern therewith, and who ought not to be in any manner affected thereby.

This illustrates what has already been suggested of the impossibility of joining the two defendants in the same action, or more strictly, in the present state of the pleadings, the impossibility of a joint verdict and judgment against the two defendants.

And whatever may be said of the Harlem R. R. Co., founded upon their neglect to provide proper seats, or put up proper notices, surely the New York and New Haven Company are not responsible for this; if this negligence aggravated the fault of the Harlem Co., the plaintiff should be turned over to them for redress. The New Haven Co. may, and do, with none the less force and propriety, refer to the plaintiff's negligence as causing his own injury, when they truly say to him that but for your folly the injury would not have been received.

I cannot resist the conviction, that these corporations engaged in great public enterprises, tending in a high degree to the public good, conducting their business necessarily at a very considerable hazard, as well from its nature as from the demand of the community upon them in respect to promptness and speed; wholly unable to carry on the business at all except by employing agents and servants in a considerable number, and, therefore, exposed to suffer from their failure to use at every moment the utmost possible prudence and foresight, I say I cannot resist the conviction that, while they are, probably, held to a stringent rule, and required to use extraordinary means to protect human life, they

are also entitled to require at least ordinary care from those they transport. That there is, in this respect, some slight reciprocity of duty which binds the passenger to take care that when an accident does happen, its consequences are not aggravated by his own negligence and folly.

However this may be, as between the passenger and the company who undertakes to carry him, and guarantees to him all the security which human skill and foresight, properly exercised under such circumstances, would provide, it is saying only what appears to me to have often been held, and properly held, that as to those who owe him no such high and peculiar duty, he cannot claim to recover where he has, by his own negligence, contributed to his hurt.

Upon any other view of the subject, the plaintiff might have voluntarily placed himself in the most exposed condition of the Harlem train, nay, even upon the engine itself, and if through any negligence, however slight, on the part of the New Haven Company, they had caused a jar sufficient to throw him to the ground and injure him, he could recover. He could even in such case say, as the plaintiff was by the charge permitted successfully to say here, "my being on the engine, however dangerous however it exposed me to peril, did not cause the jar which caused me to fall."

My conclusion is, that no joint verdict and judgment is proper in this case, and also, that the joint verdict which was rendered, was obtained under instructions which were erroneous as to both of the defendants, but which were especially so as to the New Haven Railroad Company, as well as respects their liability to a plaintiff, who was himself guilty of negligence, as also in charging upon them a liability which if it existed as to the other defendant, resulted from the peculiar relations of the latter to him, and their omission of duty in particulars over which the New Haven Company had no control, to which they in no manner contributed, and for which they are not liable.

I think, therefore, that a new trial should be ordered.

HENRY YOUNG v. ESTHER ANN CATLETT, Executrix of HENRY
LAVERTY, deceased.

In an action against the indorser of a promissory note his denial in a verified answer, of a demand and refusal of payment, protest and notice, is not an affidavit within the meaning of the statute, so as to exclude the certificate of a notary from being read in evidence.

Where a witness under examination in chief, suggests no want of recollection, and expresses no desire to refresh his memory, nor manifests by his answers any want of ability to answer readily and fully all relevant questions that may be put to him, the examining counsel cannot be allowed to place in his hands any paper or memorandum relative to facts concerning which he has been called to testify.

To permit the examining counsel to place such a paper in the hands of the witness under the circumstance stated, and in anticipation of questions that he means to put, is to suggest to the witness the answers that are desired, and is open to the strongest objections that can be urged against the allowance of leading questions.

The certificate of a notary, stating that he had demanded payment of a promissory note of an assignee of the makers, who were insolvent, "at his and their place of business," and that the assignee refused such payment, is sufficient, although it omits to state that the makers were not present when such demand was made.

Semble, that an answer which specifying all the material allegations in the complaint denies them conjunctively, is not a general or specific denial within the meaning of the Code. A denial that all the allegations so connected as a whole are true, is not a denial of the truth of each separately considered, and is entirely consistent with an admission that some one or more of them is or may be true.

Judgment for plaintiffs affirmed with costs.

(Before DICK, BOSWORTH and WOODRUFF, J.J.)

Dec. 9, 1856; Feb. 21, 1857.

APPEAL by defendants from a judgment for the plaintiff.

The action was brought upon two promissory notes, each made by Caffee and Cutter, and indorsed by Daniel T. Young and Henry Laverty; the first note was for \$1698.40, was dated the 4th of April, 1853, and payable six months after date; the second, for \$1206, was dated the 9th of July, 1853, and payable four months after date; the suit was originally commenced against Laverty, and after his death, Mrs. Catlett, as his executrix, was, by an order of the court, substituted as the defendant. In her

answer, which was verified, she, upon information and belief, denied some of the material allegations in the complaint in this form: "that whether or not upon the maturity of the notes mentioned in said complaint, the same were or either of them was duly presented to the makers thereof for payment, and payment thereof demanded and refused, and thereupon said notes duly protested for non-payment, and notice of such presentment, refusal, and protest, given to the said Henry Lavery, this defendant has no knowledge or information sufficient to form a belief." The answer then set up usury in the negotiation of the notes as a separate defence.

The cause was tried before Oakley, Chief-Justice, and a jury, in October, 1854.

Upon the trial, the plaintiff offered to read in evidence the certificate of a notary, showing the presentment, and demand, and refusal of payment of one of the notes. The counsel for the defendant objected, that the denial of these facts, in the sworn answer of the defendant, was equivalent to the affidavit required by the act of 1833, and which, when made, precludes the certificate of a notary from being received as evidence. The objection was overruled, and the counsel for the defendant duly excepted.

The certificate was then read, and stated that the notary presented the promissory note in question to the assignee of the makers, at his and their place of business in said city, and demanded of him payment thereof, which he refused. The counsel for the defendant moved that the complaint be dismissed, as to the promissory note in question, on the ground that the certificate of the notary did not show that a sufficient presentment thereof had been made to the makers. The court overruled the motion, and the counsel excepted.

M. Caffee, a witness on the part of the defendant, after having been examined for some time, by the counsel for the defendant, and having answered promptly the questions that were put to him, was asked to look, for the purpose of refreshing his memory, at a memorandum, copied by himself from entries, made in the books of Caffee & Cutter by others than himself. The plaintiff objected that the witness ought not to be allowed to look at the memorandum. The objection was sustained, and the defendant excepted.

Exceptions were also taken, on the trial, to certain parts of the charge of the Judge, but as these exceptions, in the opinion of the court at General Term, all related to questions that had been decided in the prior case of *Benedict v. Caffee*, (5 Duer, 226,) it is deemed unnecessary to state them.

The jury found a verdict for \$2819.28, for which sum, with interest and costs, the judgment was entered, from which appeal was taken.

W. Bliss, for the defendant, appellant, argued that not one of the exceptions taken on the trial ought to have been overruled, and that if any one of them was well taken he was entitled to demand a new trial. He cited, among other authorities, *Douglas*, 496; 8 East. 245; 11 East. 114, and 5 *Espinasse*, 175. He also insisted that the Chief-Justice erred in refusing permission to the witness Caffee to look, for the purpose of refreshing his memory, at his copy of the entries on the books of Caffee & Cutter, and cited on this point, 2 *Selden*, 337; 3 Term. R. 49; *id.* 754.

J. Larocque, for the plaintiff, respondent, insisted that the certificate of the notary was properly admitted in evidence, as the denial, in the answer of the defendant, was not the affidavit that the statute requires; that the certificate was *prima facie* sufficient evidence of the presentment of the note to the makers, and their refusal; as a demand of payment of and the refusal of their assignee was enough, and that it was not necessary for the notary to certify that the makers were absent when the presentment was made, the legal presumption being that such was the fact. He cited *Bell v. Lent*, (24 Wend. 230;) *Cayuga Bank v. Hunt*, (2 Hill, 635;) *Burbank v. Read*, (15 Barbour, 326;) *De Wolf v. Murray*, (2 Sand. S. C. R. 166,) and some other cases. All the other exceptions, stated in the case, he contended were plainly groundless.

BY THE COURT. WOODRUFF, J.—Upon an examination of the case before us, upon this appeal, we are able to find few questions presented for decision which have not been already disposed of in the case of *Benedict v. Caffee, et al.*, heard at the General Term of January, 1856.

We think that all of the questions arising on the charge of the

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Chief-Justice, and the requests of the defendant for other specific instructions, and most of the questions raised by objections to evidence, were either expressly decided in that case or fall within the principles there affirmed, so clearly as to require no extended discussion in this court. The opinion there given may, therefore, be taken as our opinion upon those questions, in support of the rulings of the Chief-Justice herein.

Some two or three questions are, however, suggested, which were not raised upon the other trial. The first arises as follows:

The action is brought against the defendant as the legal representative of an indorser of two promissory notes, and the complaint avers demand of payment, protest, and notice to the indorser.

The answer, adopting a form of denial authorized by the Code of procedure, says that the defendant has no knowledge or information sufficient to form a belief whether such demand was made and the notes thereupon protested, and notice given to the indorser (the defendant's testator). The answer is verified in the usual form.

On the trial the certificate of the notary of the presentment, demand, and protest of the notes was offered in evidence by the plaintiff, and it was objected that the denial contained in the verified answer of the defendant was a sufficient affidavit, under the act of 1833, (chap. 271, page 395, § 8,) to preclude the evidence.

That statute, after declaring that the certificate of the notary shall be presumptive evidence of the facts therein contained, adds this proviso: "but this section shall not apply to any case in which the defendant shall annex to his plea an affidavit denying the fact of having received notice of non-acceptance, or of non-payment of such note or bill."

When this statute was passed pleadings were not required to be verified, and the act clearly contemplates the annexation to the plea of a separate affidavit, having no connection with the pleadings, as such, specifically denying the receipt of the notice.

If the question raised by the defendant's objection and exception was an open question in this court, we should feel no hesitation in saying that the ruling on the trial was correct.

The verification of the answer is made for a distinct and different purpose. It applies to modes of expression and forms of denial sufficient for the purposes of the pleading, but in no sense

satisfying the terms of the statute; and other reasons might be suggested in support of the ruling. But it is unnecessary to pursue the subject, since the point has been already decided in *Arnold v. Rock River Railroad Company, et al*, (5 Duer's R., 207), at the General Term of this court, in which it is held that the verification of the answer is not sufficient to satisfy the statute and preclude the giving of the notary's certificate in evidence.

In the progress of the trial, the defendant, while examining one of his witnesses, (after numerous questions, all of which were answered with great particularity, and without any suggestion or pretence of want of recollection of any detail or particular called for,) required the witness to look, for the purpose of refreshing his memory, at a memorandum copied by himself, from entries made in certain books of account, at or about the time of the transactions in question, by other persons. The objection of the plaintiff's counsel to his referring to any such paper, for any such purpose, was sustained, and the defendant excepted. The examination of the witness was continued, and completed, and, though examined at great length, there was no intimation of any failure of memory, to recall each and all of the circumstances inquired of by the defendant's counsel, and his answers were explicit and positive; nor does it appear that there was any intention to examine him as to any other facts than to those to which he testified. If it were conceded that a copy from entries made by others was no more liable to objection than the original books, and that the fact that the entries were not made by himself did not affect the question, (*Huff v. Bennett*, 2 Seld. 337,) still we do not perceive the propriety of putting into the hands of a witness a paper, for the purpose of refreshing his recollection, when his memory is already fresh, and his recollection full, on the subject of inquiry. On the contrary, if the witness assumes to know and to remember, and does answer the inquiries proposed, we not only think it unnecessary to refresh his recollection, but that it would be unjust to the adverse party to permit it. An important ground for questioning the credibility of a witness, whether as untruthful or biassed, is often found in his assuming to know and state what he does not know, or to recollect what, from lapse of time or other circumstances, it is in a high degree improbable that he can remem-

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ber; and so long as the witness assumes to answer from memory, we think he should be permitted to do so.

If it might be permitted to the examining party, by anticipation, to guard against falsehood, misstatements, or indications of partiality, by showing the paper to the witness on the stand, when he gave no intimation of any want of memory, it would be liable to great abuse, and deprive the adverse party of important means of affecting his credibility.

And though it may be very proper to show such a paper to a witness, for the purpose of enabling him to supply deficiencies in his testimony, or, perhaps, even to correct inaccuracies into which he has fallen, yet where there was (as in this case) no pretence of either, in respect to any matter to which the memorandum related, we think the ruling does not call for any interference with the judgment.

To permit the examining party to place a paper in the hands of a witness, under the circumstances stated, in anticipation of the contemplated questions, is to suggest to him the answers that are desired, and is open to the strongest objections that can be urged against the allowance of leading questions.

When the witness does not suggest any want of recollection, nor express any desire to refresh his memory, nor manifest by the answers he gives any lack of ability to answer fully and specifically, we cannot think it is error not to permit him to look at a paper, at the solicitation of the counsel.

The remaining question, not covered in terms, nor by obvious inference, by the decision of this court before referred to, is, whether the certificate of the notary, in connection with the other proofs in the cause, showed a sufficient demand of payment at the maturity of one of the notes?

As to one of the notes, he certifies that he "did present the original promissory note hereto annexed, to the assignee of the makers, at his and their place of business in said city, and demanded of him payment thereof, which he refused."

Although the language of the certificate describes the person of whom the demand was made as the assignee of the makers, which does not very properly define his character or entire relation to them, yet the subsequent proof showed the previous failure of the makers, and the tenor of the objection on the trial, and the argu-

ment of the appeal, proceed upon the evident admission that the person so referred to was the assignee of the property of the insolvent firm. The points and argument of the defendant's counsel treat him as an assignee for the payment of the debts of the insolvent firm, and, in the words of the points furnished by the defendant's counsel, as "standing in the same position as an assignee in bankruptcy."

If we felt at ~~liberty to meet~~ the objection of the defendant's counsel in a mode not suggested on the trial, nor urged on the argument of the appeal, we might, perhaps, say that it is very doubtful whether any proof of demand of payment was necessary, by reason of the failure of the defendant to deny the allegation that the notes were duly presented to the makers, and payment demanded and refused.

The Code authorizes an answer containing a general or specific denial of each material allegation. (§ 149.) Under the form of a general denial the answer may deny all the allegations in the complaint in such terms that if any one is true the denial is false; or it may deny specifically such allegations as the defendant intends to controvert on the trial. But it is not clear that any thing in the Code warrants the grouping of several material allegations and denying them as an aggregate in terms which are not inconsistent with the truth of any one of them.

That part of the answer which relates to demand of payment may be stated with an abbreviation not affecting its import, thus: "That whether or not, at maturity, the said notes were, or either of them was, duly presented to the makers for payment, and payment thereof demanded and refused, and thereupon duly protested, and notice of such presentment, refusal, and protest given to the said Henry Laverty, this defendant has no knowledge or information sufficient to form a belief." This is only a denial of knowledge sufficient to form a belief whether these facts or allegations in the complaint, taken conjunctively, are true. Had the defendant been answering of his own knowledge and had, even in absolute terms, denied that the note was presented, and payment demanded and refused, and thereupon was duly protested, and notice of such presentment, refusal and protest given, ect., it might still be true, consistently with such conjunctive denial, that payment of the note was demanded of the makers. A denial that A. and B. and

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C. and D. were present on a certain occasion, is no denial that B. was present, or that A. and B. were present, and so as to either. A denial that A. went to Rome, and to Egypt, and to Jerusalem, and returned from Jerusalem to New York, is not a denial that A. went to Egypt.

136 : The denial in this answer resembles what was known as a
: negative payment under our former system of pleading, and it is
: not easy to perceive any reason for saying, that a form of expres-
: sion which is not inconsistent with the truth of a specific allegation
: in the complaint, nor inconsistent with knowledge and belief of
: such truth in the defendant, may be sustained as a sufficient
: answer under the section of the Code which prescribes the re-
: quisites of an answer. (§ 149.)

If, then, the denial of the conjoined facts be consistent with the existence and truth of any one of the separate facts, why may not the adverse party say that as to such one fact there is no denial, and it is, therefore, to be deemed admitted under that section of the Code which provides that every material allegation in the complaint, not controverted by the answer as prescribed in § 149, shall be taken as true?

As this inquiry was not made on the trial, nor on the argument, we might overlook some considerations bearing upon the subject, if we were to answer it in the plaintiff's favor. We, therefore, recur to the inquiry, whether there was sufficient evidence of a due demand of payment of the note to which this objection relates. Confessedly the demand of payment is certified to have been made at the proper time and at the proper place, the place of business of the makers.

Was it made of the proper person? In *Benedict v. Caffee*, above referred to, the court held that a presentment for payment at the place of business of the assignee was not sufficient, it not appearing that it was the place of business of the makers, but, on the contrary, the evidence showing that the makers had ceased to resort to that place.

Now although the makers had failed, and their assignee made their place of business his place of business also, still it was their place of business, and, therefore, the proper place to make presentment. In the case referred to, the opinion of the court in relation to the assignee, holds that he was not as the result of the

assignment, the general agent of the makers, to transact their business. He had no right to use the proceeds of the assigned property to pay the debts of the makers, except such as were provided for in the assignment, in such order of priority as the assignment prescribed. In virtue of the assignment, then, he had no authority to answer for the makers, or pay the note on their behalf.

If the presentment to him was sufficient, it was because his place of business was the same as that of the makers, and the notary found him there; and, it may be added, that notwithstanding the insolvency of the makers, a demand was not only necessary, but it should be made upon the insolvents personally, (Davy, 515; 8 East. 244; 11 East. 114; Story on Bills, § 346, and cases cited,) or at their residence or place of business, in the same way and manner as if they were not insolvent.

The case, then, is simply this: the notary goes to the place of business of the makers; he finds there a person whose place of business is also there, who assumes to answer, and does answer, by refusing to pay the bill.

It cannot be denied that if the makers were at the time absent from the place of business, the presentment and demand would have been sufficient. The makers were bound to have some person there with funds to pay the note, and the question is thus reduced to the narrow inquiry, will it be presumed in favor of the regularity of the official act of the notary that the makers were absent, or that the assignee was in charge of the place of business?

In *Garnett v. Wandell* (1 Starkie, 475) a bill, payable at a banker's, was presented for payment after banking hours, between seven and eight in the evening, and a boy returned for answer, "No orders." Lord Ellenborough held the presentment good, though after banking hours; and although there was no other evidence of the boy's authority, his presence at the office, assuming to answer, was held *prima facie* sufficient. Lord Ellenborough says, "The banker returned an answer by the mouth of his servant and *non constat*, but that he was stationed there for the express purpose."

In *The Cayuga Bank v. Hunt* (2 Hill, 635) where the certificate of the notary was silent in respect to the hour of presentment, it was nevertheless presumed in favor of the due performance of official duty that the presentment was during the proper hours of

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business. The like presumption was held to exist in *De Wolf v. Murray*, in this court, (2 Sand. 166,) although the certificate stated that the office or place to which the bill was addressed, was closed and no person there to give answer. To a like effect is *Burbank v. Beach*, (15 Barb. 326,) where the certificate not only did not state the time of day, but simply and only that the bill was presented at the office of the acceptors, and payment demanded which was refused.

The certificate of the notary in this case may, when read with the intendment reasonably presumable in favor of the official acts of the notary, be deemed naturally and fairly to import: that he went to the place of business of the makers; that he found there only their assignee; that he made the presentment to him and demanded payment, which was refused. We feel warranted in saying, that the proofs should be deemed to show *prima facie* a sufficient presentment, and to put the defendant upon proof of facts, if any exist, impeaching its sufficiency.

The judgment must therefore be affirmed, with costs.

FRANCIS S. ALTEMUS, and another v. THE MAYOR, ALDERMEN,
etc., OF THE CITY OF NEW YORK.

The provisions in the ordinance of the corporation, organizing the street commissioner's department are entirely consistent with those of the act of the legislature, entitled "An act to amend the charter of the city of New York, passed April 2d, 1849."

Nor are any of those provisions repealed by the act further to amend the charter of the city, passed April 12th, 1853.

No contract for a sum exceeding \$500 can be made by the street commissioner for the performance of work in his department, although such contract may have been previously awarded by him to the lowest bidder, until a specific appropriation of a definite sum for the performance of the work shall have been made by the common council.

Whether such appropriation shall or shall not be made, rests entirely in the discretion of the common council; and until it is made, there is no contract which a court, either of law or equity, can enforce.

It seems that the street commissioner is not in such a sense an officer or agent of the corporation as to render the corporation liable to an action for his neglect or refusal to perform a duty imposed on him by an act of the legislature.

(Before DUER, BOSWORTH and WOODRUFF, J.J.)

Dec. 10th, 1856; Feb. 21st, 1857.

APPEAL by plaintiffs from a judgment at Special Term, sustaining a demurrer to the complaint.

The action was brought to recover damages against the corporation for their refusal by their officer, the street commissioner, to execute and deliver to Smith, Seckel & Co. certain contracts for the performance of work in cleaning the streets of the city, which had been awarded to said Smith, Seckel & Co., as the lowest bidders, under the proposals authorized by the street commissioner. The plaintiffs claimed, as assignees of Smith, Seckel & Co. The complaint averred, that when the proposals for these contracts were advertised, and at the time of opening such proposals, an appropriation had been duly made by the common council of the city for cleaning the streets of the city, and that such appropriation then remained unexpended.

The demurrer assigned the following causes:—

1st. Because it does not appear in and by such complaint, that the appropriation alleged in the said complaint was sufficient in amount to defray or cover the expenses of the bids, or of the contract alleged in said complaint; and

2d. Because the said complaint does not state facts sufficient to constitute a cause of action against the defendants, in favor of the said plaintiffs.

The complaint, amongst other allegations, contained the following:—“And the said plaintiffs further show, that in and by an act of the legislature of the state of New York, entitled “An act to amend the charter of the city of New York, passed April 2d, 1849,” it was, among other things, enacted as follows:—

“SEC. 9. The executive power of the corporation shall be vested in the mayor, the heads of departments, and such other executive officers as shall be, from time to time, created by law; and neither the common council nor any member or committee thereof, shall perform any executive business whatever, except such as is or shall be especially imposed on them by the laws of the state, and except that the board of alderman may approve or reject the nominations of the mayor, as hereinafter provided.

“SEC. 14. There shall be an executive department, to be denominated the ‘department of streets and lamps,’ which shall have cognizance of procuring the necessary supplies for, and of, lighting the public streets and places lighted at the expense of the

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corporation, and of cleaning the public streets, and collecting the revenue arising from the sale of manure, and also of the transferring of butchers' stalls in the public markets. The chief officer thereof shall be denominated the 'commissioner of streets and lamps.' There shall be three bureaus in this department, and the chief officers thereof shall be called the 'superintendent of lamps and gas,' 'superintendent of streets,' and 'superintendent of markets.'

"SEC. 23. All contracts to be made or let by authority of the common council for work to be done or supplies to be furnished, and all sales of personal property, in the custody of the several departments or bureaus, shall be made by the appropriate heads of departments, under such regulations as shall be established by order of the common council. Every person elected or appointed to any office under the city government shall take or subscribe an oath or affirmation, before the mayor, faithfully to perform the duties of his office, which oath or affirmation shall be filed in the mayor's office."

And the said plaintiffs further show, that in and by an act of the legislature of the state of New York, entitled "An act further to amend the charter of the city of New York, passed April 12th, 1853," it was, among other things, enacted as follows:

"SEC. 12. All work to be done, and all supplies to be furnished for the corporation, involving an expenditure of more than two hundred and fifty dollars, shall be by contract, founded on sealed bids, or on proposals made in compliance with public notice for the full period of ten days; and all such contracts, when given, shall be given to the lowest bidder, with adequate security. All such bids or proposals shall be opened by the heads of departments advertising for them, in the presence of the comptroller and such of the parties making them as may desire to be present."

3d. And the said plaintiffs further show, that by certain by-laws or ordinances, duly made, ordained, and passed by the common council of the city of New York prior to the first day of January, in the year one thousand eight hundred and fifty-three, and prior to the passage of said act, it was, among other things, ordained as follows:

"SEC. 492. All supplies to be furnished, or work to be done for the corporation, when payable by assessments to be made and col-

lected under the control of, or to be assessed or collected by the corporation, shall be furnished or performed by contract; and all supplies to be furnished, or work to be done for the corporation, when payable directly from the city treasury, shall also be done and supplied by contract, and except, also, for printing, and where provision is otherwise made by this ordinance.

"SEC. 493. And it shall be the duty of each department to report, at the commencement of each stated session of the common council, the particulars of each contract made by such department since the preceding report, with all estimates made or received therefor, and the reasons for doing any work or furnishing any supplies, where the same is done or furnished without making a contract therefor.

"SEC. 494. All contracts to be entered into on the part of the corporation, for the purposes mentioned in the last section, must be authorized by the common council, (either by an appropriation previously made therefor, or by ordinance or resolution,) and, when so authorized, shall be made by the department under whose direction the supplies are to be furnished or the work performed, except that contracts for stationery for the common council, the board of supervisors, the board of health, and the departments, bureaus and officers of the corporation, and for fuel for the public buildings and offices, other than those attached to the almshouse department, shall be made by the comptroller

"SEC. 495. No contract shall be made until proposals therefor have been advertised, and estimates received and decided upon, as provided by this ordinance, except when otherwise provided by law; and no contract, for the payment of which an appropriation has not previously been made, shall be signed or executed until such contract, and all the estimates relating thereto, shall have been laid before the common council, and an appropriation made therefor, work and supplies to be done or furnished, where the same is to be paid by an assessment to be made and collected by the corporation, excepted.

"SEC. 495. The several departments who are empowered by section 493 to make contracts on the part of the corporation shall issue proposals for estimates therefor, and advertise the same in the corporation papers, for at least ten days before the day on which the estimates are to be opened.

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"SEC. 496. The proposals for estimates shall be in such form as may be prescribed by the department making the same, and shall contain the following particulars:

1. They shall require that the person making the estimates shall furnish the same, in a sealed envelope, to the head of the appropriate department, at his office, on or before a day and hour therein named, not less than ten days from the first publication thereof.

2. They shall state the quantity and quality of the supplies, or the nature and extent, as near as possible, of the work required.

3. They shall state that the estimates received will be publicly opened by the head of the department issuing the proposals, at his office, at a day and hour therein mentioned.

4. They shall state the amount in which security is required for the performance of the contract.

5. They shall state briefly the several matters required by the next four sections, to be contained in or to accompany the estimates.

"SEC. 501. At the time and place appointed for that purpose in the proposals, as prescribed by section 496, the head of the department issuing the proposals shall publicly open and read all estimates which he may have received for the contract mentioned in such proposals, and shall reject all estimates which are not furnished in conformity with sections 497, 498, and 499, and shall thereupon award the contract to the lowest bidder; or if he shall decline or shall not execute the contract, to the next lowest bidder, and so on until the same shall be executed; but no bid or estimate shall be rejected for any error of form, provided the person or persons making the estimate shall correct the same, and make it in conformity with the ordinance, within twenty-four hours after notice of any such defect."

The act of 1849 amending the charter, contains certain provisions which are not recited in the complaint, but which as they are referred to in the opinion of the court, are necessary to be stated. Section 19, among other things, provides that "no expense shall be incurred by any of the departments or officers thereof, whether the objects of expenditure shall have been ordered by the common council or not, unless an appropriation shall have been previously made concerning such expense;" and section 21 pro-

vides that "the several executive departments, and the officers and clerks thereof shall be subject to the legislative regulations and directions of the common council, so far as the same shall not be inconsistent with this act, and the duties thereof shall be performed in accordance with the charter, and laws, and ordinances of this city."

J. Larocque, for the plaintiffs, appellants.

We contend that the provisions in the 9th section of the act of 1849, amending the charter of the city, "that the executive power of the corporation shall be vested in the mayor, the heads of departments, etc., and that neither the common council, nor any committee, nor any member thereof, shall perform any executive business whatever, except such as is or shall be imposed on them by the law of the state," entirely preclude any power of consent or rejection by the common council, of the executive acts of the heads of departments, and no acts of the heads of departments are more certainly purely executive than contracts for cleaning the streets, especially as section 14 of the act of 1849, expressly vests in the department of streets and lamps the jurisdiction of cleaning the public streets, and the 23d section of the same act expressly provides that all contracts for work to be done or supplies to be furnished, shall be made by the appropriate heads of departments under such regulations as shall be established by ordinances of the common council, and we insist that this latter clause does not abridge or control the full powers vested in the heads of departments. It follows that the provision in section 494 of the city ordinance, that all contracts "must be authorized by the common council, either by an appropriation previously made therefor, or by ordinance, or resolution;" and the provision in section 495 that "no contract for the payment of which an appropriation has not previously been made, shall be signed or executed until such contract, and all estimates relating thereto, shall have been laid before the common council, and an appropriation made therefor," are repugnant to the plain provisions of the act of 1849, and therefore wholly void, and we insist that if these provisions were not void under the act of 1849, they are inconsistent with, and therefore repealed by the 12th section

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of the act for the further amendment of the charter passed in 1853. Our next position is, that if the corporation had power to restrict the heads of departments from delivering contracts until an appropriation therefor had been made, the allegation in the complaint that such an appropriation had been made, is sufficient under section 162 of the Code, prescribing the manner of alleging performance of a condition precedent. It is a mistake to suppose that the decision of this case ought to be governed by that in the case of *Smith v. The Mayor*. There is a wide difference between the cases, since in that now before the court, the street commissioner had given a written notice to Smith, Seckel & Co., of the acceptance of their bids, and Smith, Seckel & Co., in pursuance of that notice, had perfected the security required. The agreement thus made by the corporation, through its proper officer, with Smith, Seckel & Co., was an agreement for a contract, and on the refusal of the corporation to execute the contract formally, this action was properly brought to recover the damages sustained by the plaintiffs. For these reasons, the judgment of the Special Term was erroneous, and should be reversed.

M. V. B. Wilcoxson, for the defendants, respondents.

The complaint is fatally defective in not showing that an appropriation was at any time made by the common council for the payment of the expenses of the contracts set forth in the complaint, and at any rate, the complaint does not show that the appropriation alleged therein was sufficient to cover those expenses. *Smith v. The Mayor, etc.*, of New York, (4 Sand. S. C. R. p. 221,) affirmed in Court of Appeals, Oct. 1853. It is also an objection to the complaint, that it does not allege that the corporation had not contracted with any other person than Smith, Seckel & Co. to perform the work for which they contracted.

But if it be admitted that it is sufficiently alleged that the common council had made a sufficient appropriation, they are not liable for the refusal of the street commissioner, Ebling, to execute the contracts in question. He was an independent public officer, and if his neglect or refusal was a tort, it was not a tort committed by the defendants, but by him alone; and the remedy of the plaintiffs was by a mandamus against him, to compel him to per-

form his duty, or by an action on the case against him, for his neglect. (Tapping on Mandamus, p. 58; *People ex rel. Morris v. Edmonds*, 15 Barb. 529.) Finally, the mayor and corporation could not be bound until, by some act on their part, the bid of Smith, Seckle & Co. had been accepted, and we insist that this was so determined by the Court of Appeals, in the case to which we have before referred, of *Smith v. The Mayor*. The judgment appealed from ought, therefore, to be affirmed with costs.

BY THE COURT. DUER, J.—This case derives some importance from the fact that the tax-payers of the city are more or less interested in its decision.

The only questions that we propose to consider and decide, are those which relate to the validity and construction of certain sections in the ordinance of the common council, which is referred to in the complaint, for it will be seen, hereafter, that if the views of the learned counsel for the plaintiffs, upon these questions, cannot be sustained, the judgment appealed from must, of necessity, be affirmed.

The contention, on the part of the plaintiffs, is,

First, That sections 494 and 495 of the ordinance of the common council, were void when enacted, as plainly repugnant to certain provisions in the act of 1849 amending the charter of the city; or,

Second, That these sections, if not void in their origin, were fully repealed by the 12th section of the act of April, 1853.

We do not think that either proposition can rightfully be made a ground of our decision; to neither can we give our assent. As to the first, in our judgment, the provisions of the ordinance of the common council and those of the act of 1849, are so far from being manifestly repugnant, that, when properly examined and compared, they will be found to be, in all respects, consistent and harmonious.

Section 494 of the ordinance provides that all contracts on the part of the corporation must be authorized by the common council, either by an appropriation previously made therefor, by ordinance, or resolution; and when so authorized, with certain exceptions, shall be made by the department under whose direction the supplies are to be furnished, or the work performed; and section

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495 provides, among other things, that no contract, for the payment of which an appropriation has not previously been made, shall be signed or executed until such contract, and all the estimates relating thereto, shall have been laid before the common council.

We certainly think that the fair construction of the section is, that no contract for supplies or work can rightfully be made by any department of the city government, until it shall have been authorized by a previous appropriation, ordinance, or resolution, of the common council; and it will be seen hereafter that this construction is consistent with the provisions of the act of 1849; but we are not disposed to say, that a contract, although not previously authorized, is not valid, when all the estimates relating thereto had been laid before the common council, and a necessary appropriation then been made. Perhaps, to such a case, the maxim that a subsequent adoption is equivalent to a prior authority, would be held to apply. The argument, however, on the part of the plaintiffs, is, that whatever construction may be given to these sections, they are wholly void, so far as they give any power to the common council to direct any contract to be made, or to make any appropriation for its completion; and if this allegation be well founded, it follows that the head of each department, and not merely the street commissioner, has an unlimited and absolute control over the expenditures of his department; and it follows that, in the exercise of his own discretion, he may determine what contracts for service or work, belonging to his department, shall be entered into, and what sums appropriated to their completion, without being subject to the control or interference of the common council, however flagrant may be the abuse of his discretion, and mischievous the consequences to which it leads. It is possible that the legislature intended to vest in the heads of departments this unlimited and uncontrolled authority, but that such was its intention we deem to be highly improbable. We think the words must be clear and explicit, or the implication plain and necessary, to justify the conclusion that the plaintiffs require us to adopt.

The provisions in the act of 1849, which are relied on as evidence that the intention of the legislature was such as has been asserted, are to be found in sections 14 and 9 of that act. Sec-

tion 14 merely declares that the department of streets and lamps shall have cognizance, among other things, of cleaning the public streets, but it is obvious that these words may be fully satisfied by giving to the department a supervisory power over the cleaning of streets, and making it its duty to see that all contracts for that purpose shall be faithfully executed. They do not expressly, or by any reasonable implication, prohibit the common council from authorizing, or ratifying, all contracts to be made by the department, by a suitable ordinance, resolution, or appropriation. They are, therefore, not at all inconsistent with those provisions of the ordinance in question, to which they are alleged to be repugnant.

The question, therefore, whether this repugnance exists, turns entirely upon the construction to be given to the 9th section of the act of 1849, which declares "that the executive power of the corporation shall be vested in the mayor, the heads of departments, and such other executive officers as shall be, from time to time, created by law, and that neither the common council, nor any member or committee thereof, shall perform any executive business whatever." Executive business includes all acts which a public officer is directed, or authorized, to perform by some legislative authority that he is bound to obey. The section forbids any such act to be performed by the common council, and vests an executive authority to perform them in the mayor and heads of departments. Hence, if an ordinance of the common council, directing a particular contract to be made, relative to any work of which the street department has cognizance, or appropriating a definite sum for the payment of the contract when made, is an executive act, there would seem no escape from the conclusion that the ordinance, as inconsistent with the expressed will of the legislature, must be void.

But the conclusive reply is, that when the work to be contracted for is for the benefit of the public, and is to be paid for out of a public fund, the authority to make the contract and an appropriation for its payment are not executive acts, but are properly and purely acts of legislation, and have uniformly been considered and treated as such by the legislature of the state as well as by the common council of the city. They are not, in their own nature, executive acts, nor are they declared to be so by any express

words in the act of 1849; hence the argument built upon the 9th section of the act falls to the ground.

Nor is that all. There are other sections in the act of 1849 which, to our minds, render it apparent that it was the intention of the legislature that the heads of departments, in making contracts for services or work in their respective departments, should be subject to the direction and control of the common council; in other words, that the common council should possess and exercise, in relation to such contracts, the very powers that, in order to sustain the argument for the plaintiffs, are now denied to it.

Thus § 23 declares, that "all contracts to be made or let by the authority of the common council, for work to be done or supplies to be furnished, shall be made by the appropriate heads of departments, under such regulations as shall be established by ordinances of the common council." These provisions, in our judgment, are alone sufficient to prove that the intentions of the legislature, as to the powers to be exercised by the common council, were exactly such as we have stated. They plainly give to the common council the power of determining what contracts shall be made in each department of the city government for work to be done or supplies to be furnished, and of prescribing by proper ordinances the course to be followed by the head of the department in making the contracts that the common council has authorized and instructed him to make. It appears to us that sections 494 and 495, considering each section as an ordinance, were ordinances of this character, and the regulations which they contain a legitimate exercise of the powers that the provisions we have recited—if not in terms, yet by their necessary construction—were meant to confer.

Section 23 is set forth in the complaint; but there are other sections in the act of 1849 not set forth in the complaint nor cited on the argument which, we think, are conclusive to show that the intentions of the legislature were exactly those which we have held that section 23 sufficiently expresses.

The sections to which we refer are sections 21 and 19.

Section 21 provides that "the several executive departments, and the officers and clerks thereof, shall be subject to the legislative regulations and directions of the common council, so far as the same shall not be inconsistent with this act." We have already shown that the regulations alleged to be void in sections

494 and 495 are legislative in their scope and objects, and as such not inconsistent with any provisions in the act of 1849; they are, therefore, regulations that the common council had authority to make, and the executive departments and their officers were bound to obey.

We pass to section 19, the terms of which, if we mistake not, put the question we are considering completely at rest. Among other things, this section provides that "no expense shall be incurred by any of the departments or officers thereof, whether the object of the expenditure shall have been ordered by the common council or not, unless an appropriation shall have been previously made concerning such expense."

We can see no reason whatever, for doubting that among the expenses that are here forbidden to be incurred without a previous appropriation are the necessary expenses of fulfilling a contract made by the head of a department, although the contract may have been awarded by him to the lowest bidder. Indeed, we are satisfied that contract expenses are those that were principally in the view of the legislature, and not those comparatively trifling ones for which no contract is required. Hence the provision in section 495 of the ordinance of the common council that "no contract, for the payment of which an appropriation has not previously been made, shall be signed or executed until such contract and all the estimates relating thereto shall have been laid before the common council, and an appropriation been made therefor," so far from contradicting in any respect the act of 1849, carries out by expressing more fully some of its actual provisions. The law and the ordinance, although in different terms, equally forbid that the necessary expenses of a contract made by the head of a department shall be incurred until an appropriation to cover those expenses shall have been made, and we think they equally imply, that whether such an appropriation shall or shall not be made rests entirely in the discretion of the common council. Hence, had there been no ordinance on the subject, the necessity created by the law of a previous appropriation to warrant the completion of a contract, would still exist, and, unless the law has been repealed, the refusal or omission by the common council to make the appropriation would still be a bar to the maintenance of an action like the present, against the corporation or any of its officers.

It follows from the observations that have been made, that the provisions in sections 494 and 495, were not as is alleged, void in their origin, but on the contrary, were binding from the time of their enactment on the executive departments, their heads and officers; consequently, unless they were repealed by the act of 1853, they were in force when the contracts mentioned in the complaint were awarded to the lowest bidders; so that if it shall appear that the conditions they prescribe have not been complied with, it is certain that the present action cannot be maintained. The question of their repeal is therefore next to be considered.

The only section in the act of 1853, to which the counsel for the plaintiffs referred in support of his argument, is the 12th, and the only words in that section upon which he relied, are those which declare that "all contracts for work to be done or supplies to be furnished for the corporation when given, shall be given to the lowest bidder with adequate security." If the words, "shall be given to the lowest bidder" must of necessity be understood as meaning that a contract for work or supplies must be delivered fully executed to the lowest bidder, and when so delivered be valid in his hand, although not made under any previous authority from the common council, and although no appropriations for its expenses shall have been made, it cannot be denied, that they effectually repeal, not only the provisions of the ordinances—as the sections in question may with propriety be termed—but equally those in the act of 1849, (§ 19,) with which those of this ordinance substantially correspond.

It is not easy to believe that this sweeping repeal was contemplated by the legislature. It is not easy to believe, that if intended, the intention would not have been expressed in positive terms; hence, if the words, "shall be given to the lowest bidder," may be understood in a sense not involving the repeal contended for, it is such an interpretation that we shall hold ourselves bound to give to them. It is an elementary rule that an existing statute can only be abrogated by express words, or by a necessary implication. Where there are no express words of repeal, a subsequent statute never operates as repeal of a prior, unless their provisions are manifestly inconsistent, and by no reasonable construction can be reconciled. When a consistent interpretation may be given to provisions apparently conflicting, it is the duty of the

court to adopt it as probably expressing the true intention of the legislature. We think that there is no difficulty in applying those rules to the case before us. We are satisfied that the words "shall be given," etc., in the 12th section of the act of 1853, may and ought to be understood in a sense that will render them entirely consistent with the provisions in section 19 of the act of 1849, and consequently with the ordinances of the common council, nor do we doubt, that the interpretation that we shall follow is that which truly expresses the intention of the legislature.

Section 501 of the ordinance referred to in the complaint, provides that where contracts have been proposed for a particular work, in conformity to the terms prescribed by previous sections of the ordinance, the head of the department in which the work is to be performed, "shall award the contract to the lowest bidder," and our conviction is, that these words in the ordinance and the words in the act of 1853, that "the contract, when given, shall be given to the lowest bidder," express, and were designed to express, exactly the same meaning, and it is plain, that the latter words thus construed are entirely consistent both with the act of 1849, and with the ordinances of the common council. The contract must be given to the lowest bidder, but it is not to be signed and executed until an appropriation for its expenses has been made, and in this, if the word "given," as we hold, expresses no more than "awarded," there is certainly no contradiction.

The state of the law, as it now exists, appears to be this: When a contract is sanctioned by a previous appropriation for its expenses, the lowest bidder to whom it is awarded, and by whom the security required is given, has an immediate right to demand its formal execution and delivery; where there has been no such previous appropriation, his rights are suspended, and the contract remains incomplete, until the necessary appropriation has been made, and that when the common council refuses to make the necessary appropriation the contract is wholly defeated, and its formal execution and delivery by the head of the department by whom it has been made and awarded, as acts in plain violation of his duty, would be null and void.

The next allegation on the part of the plaintiffs is, that even upon the supposition that an appropriation by the common council for the expenses of a contract is a condition precedent to its

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final execution and delivery, the complaint, as framed, contains a sufficient averment that such an appropriation was in fact made, and consequently, that if the right of the plaintiffs to maintain this action depends upon the truth of this averment, the demurrer to the complaint ought to have been overruled, and an answer have been required.

The averment in the complaint which is relied on as sufficient, is, that before the several contracts mentioned in the complaint were awarded to the lowest bidders, "an appropriation had been duly made by the common council of the city for cleaning the streets of the city, and that such appropriation then remained unexpended." We have no right to say, although such is undoubtedly the fact, that no appropriation for cleaning the streets of the city was or could have been made by the common council since the truth of the averment, as made, is admitted by the demurrer, but it is quite certain, that a general appropriation for cleaning the streets is not such an appropriation as section 19 in the act of 1849, and section 495 in the ordinance of the common council, require to be made as a condition precedent to the final signing and execution of a contract. The appropriation that they require is not general but specific, and is necessarily limited in its amount by the nature and objects of the particular contract to which alone it refers.

We have already shown that the general words, in section 19 of the act, embrace expenditures under a contract, and they in effect forbid any such expenditure to be made even when its objects have been ordered by the common council, "unless an appropriation shall have been previously made concerning such expense," and these last words, we do not doubt, are equivalent in meaning to providing for such expense.

The appropriation which section 495 of the ordinance required to be made as a condition precedent to the signing or execution of a contract is, by express words, limited to "the payment of the contract; that is limited to a sum sufficient to cover the necessary expenses of the contract."

It seems to us, therefore, quite evident, that the appropriation which the act of 1849, and the ordinance of the common council require to be made is in all cases limited to the expenses of the contract to which alone the appropriation relates. In other words,

that the appropriation meant is, in all cases, of such a definite sum as, in the judgment of the common council, will be adequate to defray the necessary or probable expenses of the contract. Indeed it is for the purpose of enabling the common council to determine whether, from the terms of a contract, a larger expenditure will be necessary than in prudence or justice ought to be made, that the contract itself, and the estimates upon which it was founded, are required to be laid before it.

We hold it, therefore, to be certain that it is a specific appropriation, limited to the expenses of a contract, that is made a condition precedent to the signing or execution of any separate contract made by a street commissioner or any other head of a department. Hence it is such an appropriation that, if this action could be suffered to proceed, the plaintiffs would be bound to prove upon the trial, and it is such an appropriation that, as a material and issuable fact, constituting in part the cause of action, they were bound to aver in their complaint. The complaint contains no such averment and was, therefore, justly liable to a demurrer upon the ground that the facts which it sets forth are not sufficient to constitute a cause of action.

We have now considered and decided all the questions that were raised and argued by the able counsel for the plaintiffs, relative to the validity and construction of the ordinances (sections 494 and 495) of the common council, and relative to the powers and duties of the common council and of the street commissioner, under these ordinances and under the laws of the state, the acts of 1849 and 1853, and the necessary result from our decision of these questions is, that the judgment at Special Term, sustaining the demurrer to the complaint, must be affirmed, with costs.

It was earnestly insisted by the counsel for the plaintiffs that there was such wide difference between this case and that of *Smith v. The Mayor, etc.*, (4 Sand. S. C. Rep. p. 220,) in which the judgment of this court was affirmed in the Court of Appeals, that they deprived the judgment so affirmed of any force or application as an authority; that the differences exist, which the counsel pointed out, cannot be denied; that they produced the effect for which he contended, we cannot admit. There are several questions that were virtually decided in *Smith v. The Mayor, etc.*, exactly as the same questions have now been decided by ourselves and there

are two questions, directly bearing upon the merits of the controversy, that in the Court of Appeals were expressly decided, namely, that whether an appropriation for a contract shall or shall not be made in any given case, rests entirely in the discretion of the common council, and that, when the appropriation is withheld, no action is maintainable against the corporation. Mr. Justice Willard, in delivering the unanimous judgment of the court, said, that the 494th section of the corporation ordinances, which provides that no contract shall be signed or executed until the contract, and all the estimates relating thereto, shall have been laid before the common council, and appropriation made therefor, would be entirely senseless, "unless the corporation have the right to refuse to enter into the contract, and to refuse the appropriation to carry it out," and that, "until the final action of the corporation, the proceeding is incomplete, and liable to be defeated by the refusal of that body to proceed further."

Holding, as we have done, that the complaint in this case contains no averment that any appropriation was made by the common council for the contracts awarded by the street commissioner, we are satisfied that this decision of the Court of Appeals ought to control our own, even had we entertained opposite views upon the questions it embraces. The contracts, therefore, that were awarded to Smith, Seckel & Co., as the lowest bidders, as there was no previous appropriation for their expenses, were inchoate and incomplete, and by the refusal of the common council to make the necessary appropriation, were rendered and became wholly void. From that time there was no contract for which, or the breach of which, an action at law could be maintained against the corporation, or the specific performance of which could be decreed in equity.

Whether, upon the supposition that the complaint contains a sufficient averment that a previous appropriation had been made for the contracts in question, the corporation would be liable for the refusal of the street commissioner to sign or execute the contracts, is a question that we deem it needless to determine. If the contracts were made under a previous appropriation, the act of 1849 made it the duty of the commissioner to execute and deliver them; but upon what principle the corporation could be made liable for his violation of a personal duty imposed upon him

by the legislature, it is not easy to understand; as the question, however, in our opinion, is not presented by the case, we leave it undecided, we do not sit here to determine questions that we regard as hypothetical.

Judgment at Special Term affirmed with costs.

KETCHUM, and others v. STEVENS, President of the Bank of Commerce of New York.

On the 29th of June, 1854, the plaintiffs held a check for \$10,000, drawn by the Schuylers on the defendants, which the latter refused to pay, there being, at the time of the last refusal to pay, money deposited with them to the credit of the Schuylers, sufficient to pay the check.

At that time the Schuylers owed the defendants \$25,000 and interest, evidenced by two stock notes, payable on demand, which notes, by their terms, pledged 370 shares of New York and New Haven Railroad stock for the payment thereof, with authority to sell the stocks, at public or private sale, without notice, on the Schuylers' failing to pay as they had promised. On the 1st of July, 1854, the defendants surrendered the certificates of stock to the railroad company, and had a transfer of the shares made on the books of the company to themselves; and obtained a certificate of their being entitled to that amount of stock in the usual form.

On the day of, and after such transfer, the plaintiffs had two interviews with the defendants; inquiry was made of the latter why the check, which had again been presented for payment on that day, was not paid. The answer was, "because the bank had a loan demand on the drawers, which would absorb the whole amount of the credit of the firm. The question was put if the bank had not security, and the information was finally given that they held 370 shares of the stock, which, at 70, would cover the loan. At a subsequent interview, the inquiry was made by Mr. Bement," (one of the plaintiffs), "whether an assignment of the securities would be made and the check paid, upon discharging the loan?" The cashier and president of the bank replied that they could do nothing without the consent or order of the Schuylers. The terms of an arrangement being understood, subject to this condition, Bement obtained from the Schuylers this order:

"New York, July 1, 1854.

"Please deliver to Rogers, Ketchum & Bement, 370 shares of New Haven Railroad stock, upon their paying our notes for which said shares are pledged.

"To Cashier, Bank of Commerce.

"R. & G. L. SCHUYLER."

This order was exhibited to the defendants by the plaintiffs, who at the same time paid them the \$25,000 and interest, and received from the defendants the certificate for the 370 shares of stock which had been so issued to the bank, with a power of attorney authorizing its transfer, and their cashier's receipt that he

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had received payment of the Schuyler notes of Ketchum, Rogers & Bement, and delivered them the securities," and the defendants then paid to the plaintiffs the check for \$10,000. On what arrangement the plaintiffs got such order from the Schuylers was not shown. The certificate did not represent genuine or actual stock, and was worthless. Of that fact the plaintiffs and defendants were alike ignorant, and the defendants acted in good faith throughout. On these facts, *held*,

1. The plaintiffs paid, for the Schuylers, to the defendants, the amount which the Schuylers owed to the latter.
 2. Such payment was made pursuant to an arrangement between the plaintiffs and the Schuylers, as the principals and the sole contracting parties.
 3. The delivery to the plaintiffs, by the defendants, of the securities called stocks, was in consequence of and in obedience to the order of the Schuylers, and by authority of it, and was not in execution of any contract of the defendants to sell and deliver to the plaintiffs 370 shares of stock.
 4. The defendants were paid no more, as a condition of delivering the stock, than it was their right to demand, before they could have been compelled, by the Schuylers or any other person, to surrender it.
 5. If the plaintiffs paid this money for a consideration which has failed, or by reason of the suppression by the Schuylers of the information that the stock was false and spurious, their only remedy is against the Schuylers, on whose account it was paid. (Woodruff, J., dissented.)
- A check, before acceptance, does not operate as an assignment of funds deposited by the drawer to his general credit with the drawee, nor create any lien thereon. When the drawees, at the time the check is drawn and presented, hold a note made by the drawer, payable on demand, such note may be off-set against the claim of such drawer to recover the amount due for money so deposited, although actual payment of the note has not been demanded. No actual demand before suit brought is essential to the right to maintain an action on such a note, and of course it can be set up, as a set-off, without a previous demand. Stock pledged as security for the payment of such a note, with power to sell the stock on default of the maker to perform his promise to pay, cannot rightfully be sold until after payment has been demanded; but such a note may be sued upon, or set-off, at a time when, by reason of no demand of payment having been made, the stock, pledged for its payment, could not be lawfully sold.

(Before DUER, BOSWORTH and WOODRUFF, J.J.)

December 17, 1856; February 28, 1857.

THIS action comes before the General Term on an appeal by the plaintiffs from a judgment dismissing their complaint. It was tried before Mr. Justice Hoffman, without a jury, in October, 1854.

It was brought for the purpose of rescinding a contract alleged to have been made between the plaintiffs and the defendant.

The alleged contract was, that the plaintiffs should pay to

the defendants two loans which they had made to the Schuylers, amounting in all to \$25,000 and interest, in consideration of which, the defendants should pay to the plaintiffs a check for \$10,000, held by the latter, and drawn by the Schuylers on the defendants, and should transfer to the plaintiffs notes given by the Schuylers for the amount of said loans, and three hundred and seventy shares of the stock of the New York and New Haven Railroad Co., held by the defendants as collateral security for the payment of such notes and the said loans.

The plaintiffs, having paid the \$25,000 and interest, and received payment of said check, claimed to rescind the alleged contract on the ground of fraudulent misrepresentations made by the defendants, that the security they held was stock, when, in fact and in law, they held no stock, and, at the same time, to retain the \$10,000 paid to them on the check, on the ground that the defendants, irrespective of the alleged contract, ought to have paid the check as a matter of legal duty.

The said Justice found, as matter of fact and conclusion of law, as follows:

"That on the 29th day of June, 1854, a check was drawn by the firm of R. & G. L. Schuyler, of which Robert Schuyler was a member, upon the Bank of Commerce in New York, for the sum of \$10,000, in favor of the plaintiffs, acting under the firm of Ketchum, Rogers, & Bement. This check was given for a loan made by the plaintiffs to the firm of R. & G. L. Schuyler.

"On the 29th day of June, and about one o'clock, the check was presented to the teller of the bank, and payment refused; also,

"That on the same day a deposit was made to the credit of the firm of R. & G. L. Schuyler of about \$9,000, which, with the sum already to their credit, made an amount sufficient to meet the check. This sum of \$9,000 was handed to a clerk about six minutes before three o'clock, to be deposited.

"This check was, on the next day, namely, the 30th of June, and shortly after ten o'clock, deposited in the City Bank by the plaintiffs. It was sent from that bank with the receipts of that day, and went to the Clearing House about a quarter before ten of the 1st of July. It was sent back to the City Bank by the Bank of Commerce about eleven o'clock of that day as not being

good. The teller of the City Bank shortly after returned it to the plaintiffs.

"On the 30th of June the Schuylers failed. On that day there was a note of the firm which had been discounted at the Bank of Commerce for a third party. About half-past two o'clock the cashier was informed that such note was unpaid. Inquiries were then made by him at the office of the firm. Neither of the members was present; and he was there informed that the firm had failed. After this, the cashier, Mr. Vail, directed the teller of the bank not to pay any checks of the firm which might be presented.

"That the tellers of the bank had been instructed sixty days before not to pay the checks of the firm unless funds were in the bank, nor to take checks from them on other banks on deposit unless certified; and in the latter case checks had been frequently rejected when not certified.

"Some time before the 29th of June, the bank had loaned to the firm the sum of \$30,000, in two loans, at different times, for which the stock notes hereafter mentioned were taken. These were, as usual, payable on demand, with the customary statement of a deposit of stock. Five thousand dollars had been paid before the 29th of June.

"At the time when the check of \$10,000 was presented, on the 29th of June, there were not sufficient funds in the bank to pay it.

"One of the notes held by the Bank of Commerce was payable at such bank. On this \$10,000 and interest was payable. The cashier called on the 30th in relation to a note discounted at the bank on behalf of a third person, and which it was supposed would not be paid, and was not paid. Neither of the firm was to be found. Again, he is shown to have called to make a demand at the office, but did not find either of the partners, and was informed by a clerk of the failure; and on the morning of the 1st of July an order was obtained from one of the firm, sanctioning the transfer of the collaterals and notes, on payment of the debt."

"I further find as matters of fact,

"That, on the 10th of February, 1854, a certificate was entered in the certificate book of the New York and New Haven Railroad Company, numbered 4353, for two hundred shares of its stock, in the name of R. & G. L. Schuyler. No transfer was made on that day of such shares on the transfer-book, or stock-ledger,

"On the 4th of March, 1854, another certificate was entered in the certificate-book of the company, in the name of the firm, but no transfer from the firm was made on that day upon the transfer-book or ledger.

"On the 6th of May, 1854, the firm of R. & G. L. Schuyler borrowed from the Bank of Commerce the sum of \$15,000, and thereupon executed to them a note, usually called a stock note, payable on demand, stating that they had deposited with the bank, as collateral security, with authority to sell the same at the brokers' board or at public or private sale, or otherwise, at their option, on the non-performance of the promise, and without notice, two hundred shares of the capital stock of the New York and New Haven Railroad Company, as per certificate 4353 annexed. The certificate thus annexed had the usual power attached in favor of H. F. Vail, (the cashier of the bank,) to make a transfer.

"On the 6th of April, 1854, the firm borrowed of the bank the sum of \$15,000, for which they executed another stock note in the same form, with the variation of authorizing the president or cashier, as well as the bank, to sell in case of default. For this loan, one hundred and seventy shares of the stock were pledged. The power annexed to the certificate was 4409, and was dated 4th of March.

"Each of these certificates was signed 'Robert Schuyler, Transfer Agent;' and it seems that No. 4409 was made use of before 4353. One of those in question is as follows:

" 'New York and New Haven Railroad Company
No. 4409.

Capital, \$3,000,000.

New York office.

Shares \$100 each.

" 'Be it known that R. & G. L. Schuyler, of New York, are entitled to one hundred and seventy (170) shares of the capital stock of the New York and New Haven Railroad Company, transferable on the books of the company at its office in the city of New York, by the said R. & G. L. Schuyler, or their attorney, on the surrender of this certificate.

" 'ROBERT SCHUYLER, Transfer Agent.'

" 'Know all men by these presents that, for value received,

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have bargained, sold, assigned, and transferred, and by these presents do bargain, sell, assign, and transfer unto
of shares in the capital stock
of the New York and New Haven Railroad Company, standing
in name on the books of said company, and transferred only
at its office in the city of New York. And do hereby constitute and appoint H. F. Vail, our true and lawful attorney, irrevocable for and in name and stead, but to use,
to sell, assign, transfer, and set over, all or any part of the said stock, and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute with like full power, hereby ratifying and confirming all that
said attorney, or substitute or substitutes
shall lawfully do by virtue hereof.

“‘In witness whereof, we hereunto set our hand and seal, the fourth day of March, one thousand eight hundred and fifty-four.

“‘R. & G. L. SCHUYLER

“‘Sealed and delivered in the presence of

“‘A. J. VANDEVENTER.’

“Neither on the 6th of April, nor the 6th of May, was there any transfer entered from the firm to Mr. Vail.

“On the 30th of June, upon ascertaining the failure of the firm, Mr. Vail called at the office to effect a transfer of the three hundred and seventy shares, but it being after the usual hours of business, and the books being locked up, the transfer was not effected. On the morning of the 1st of July, Mr. Vail went to the office about a quarter before eleven, and transferred the stock from the name of the Schuylers to that of John A. Stevens, president. He was promised a certificate, which he received about half-past twelve. On making this transfer, the certificates of two hundred and one hundred and seventy shares, numbered 4353 and 4409 were surrendered, and a new certificate of three hundred and seventy shares (No. 4897) was issued, dated July 1st, 1854, signed by W. E. Worthen, transfer agent. A blank power of attorney was annexed. Mr. Stevens was the president of the bank. After this transfer, and on the morning of the 1st of July, as before stated, the check of the firm for \$10,000 had been finally presented, and rejected. It came back to the plaintiffs from the City

Bank probably about eleven o'clock. A series of interviews then took place between Mr. Bement, one of the plaintiffs, and Mr. Vail, the cashier of the Bank of Commerce. The first was after eleven, the two next between one and two o'clock. The inquiry was made why the check was dishonored? and the answer was given, because the bank had a loan demand on the drawers which would absorb the whole amount of the credit of the firm. The question was put, if the bank had not security, and the information was given, that they held three hundred and seventy shares of the stock, which at seventy would cover the loan. At a subsequent interview, the inquiry was made by Mr. Bement, whether an assignment of the securities would be made, and the check paid upon discharging the loan. This was between one and two o'clock of the 1st of July.

"It was insisted upon by the cashier, and confirmed by the president, that they could do nothing without the consent or order of the Messrs. Schuylers. The terms of an arrangement being understood, subject to this condition, an order was obtained by Mr. Bement, signed by Geo. L. Schuyler, in the name of the firm, as follows :

"Please deliver to Rogers, Ketchum & Bement three hundred and seventy shares of New Haven R. R. stock, upon their paying our notes, for which said shares are pledged.

"R. & G. L. SCHUYLER.

"New York, July 1, 1853.

"To cashier Bank of Commerce, New York.'

"At about two o'clock the last interview took place. The order was exhibited; Mr. Bement produced a certified check for \$25,000, and another in blank, which was filled up with the interest due. The certificate for three hundred and seventy shares in favor of Mr. Stevens, with a power in blank signed by him was delivered, and the check for \$10,000 was then paid by the bank. No transfer was made on the books of the company from Mr. Stevens to the plaintiffs, although the cashier had requested that it should be done forthwith.

"The form of the transfer used by the company may be useful, and that made by Mr. Vail, as attorney, to Mr. Stevens, is subjoined.

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“ ‘Capital \$3,000,000. No. 9,904.

“ ‘Shares \$100 each.

“ ‘For value received, we hereby transfer unto John A. Stevens, president, all our right, title, and interest in three hundred and seventy shares in the capital of the New York and New Haven Railroad Company.

“ ‘R. & G. L. SCHUYLER,

“ ‘By attorney, H. F. VAIL.’

“ On the 5th of July, a letter of Robert Schuyler, resigning his office as president and transfer agent, and calling attention to the stock ledger, was read at the board, and the transfer books were directed to be closed.

“ And on the 10th day of July, the plaintiffs addressed a letter to the president of the bank, stating that neither the bank nor any one else was entitled, on the 1st of July, to the three hundred and seventy shares of the stock which they possessed, and held out to hold, and upon the faith of which the plaintiffs had advanced the sum of \$25,000. They then demanded re-payment of that sum, upon which they would return what falsely purported to be a certificate and assignment for three hundred and seventy shares of stock of the company.”

“ I further find, as matter of fact,

“ That on the 17th of October, 1853, the firm of R. & G. L. Schuyler had to their credit, on the books of the company, four shares of stock. That an entry as of that date appears on the stock ledger, carrying to the credit of the firm, as from ‘Robert Schuyler, transfer agent,’ five thousand shares.

“ This entry was made in April, 1854, and was effected by erasing the entry before made on the line, and writing over it. That erased entry was a credit of one hundred shares of stock by E. W. C., D. & Co., which was dated November 9, 1853, and was subsequently interlined between entries of the 29th of November, and the 1st of December, 1853.

“ After certain other entries to the credit of the firm, and under date of the 3d of February, 1854, another entry to their credit of five thousand shares is made, as from Robert Schuyler, transfer agent. This entry was also made in April, 1854, at the same time as the previous one, and was written on an erasure of an entry of one hundred shares to their credit, and that entry was trans-

ferred to a line after an entry of April 14th. These two entries were fabrications of credits.

“Between the 17th of October 1853, and the 19th of June, 1854, the firm appears to have transferred by debits on the stock ledger, fourteen thousand six hundred and fifty-two (14,652) shares, and between the same dates to have transferred to them three thousand five hundred and eighty-one (3581) shares; leaving a balance of excess of transfers of eleven thousand and seventy-one (11,071) shares.

“After the 19th of June, the firm did not receive any transfers, and their own issues, down to the 3d of July, inclusive, amounted to six thousand four hundred and twenty (6420) shares. That the whole excess was seventeen thousand four hundred and ninety-one (17,491) shares, and the excess, had the ten thousand been genuine, would have been seven thousand four hundred and ninety-one.

“That if these credits had been genuine, the firm would have been entitled, on the 1st of February, 1854, to five hundred and ninety (590) shares, and the balance against them, on the 8th of June, would have been four hundred and eighty-one (481) shares, and which gradually increased to the seven thousand four hundred and ninety-one, on the 3d of July.

“The undoubted genuine stock, which was acquired by the firm, among the transfers to them from October 17, 1853, to June 19, 1844, was about one thousand shares.

“The certificate No. 4353, for two hundred shares, with the power to H. F. Vail, was dated the 10th of February, 1854, and the certificate No. 4409, for one hundred and seventy shares, the 4th of March of the same year. Neither of these certificates were accompanied with a transfer at their respective dates to Mr. Vail, or any one else, on the transfer book, nor, of course, on the stock ledger. They do not so appear at all, except as consolidated in the certificate issued, and the transfer made, on the 1st of July, to John A. Stevens, of three hundred and seventy shares.

“And I find that the Bank of Commerce did not acquire genuine stock under and by virtue of the certificates issued on the 10th of February and 4th of March, respectively, nor under the certificates of the 1st of July, for 370 shares, and consequently plaintiffs did not receive genuine stock under the transfer to them.

“ And I further find, as matter of fact, that

“ The first section of the charter passed 1st of May, 1844, constituted Joseph E. Sheffield, and others, naming them, with such other persons as shall associate with them for that purpose, a body politic and corporate, by the name of the New York and New Haven Railroad Company.

“ The second section provides, that the capital stock shall be \$2,000,000, with the privilege of increasing the same to \$3,000,000, and to be divided into shares of \$100 each, which shares shall be deemed personal property, and shall be transferred in such manner and at such places as the by-laws of the company shall direct.

“ By the third section, the parties who were authorized to receive subscriptions might make 20,000 shares subscribed the capital stock of the company. But if the subscription exceeded 30,000, the same were to be reduced, and apportioned in such manner as should be deemed most beneficial to the corporation.

“ That, under the fourth section, the immediate government and direction of the affairs of the company were vested in a board of nine directors, to be chosen by the stockholders. Four of such directors formed a quorum for the transaction of business.

“ By the seventh section, the directors were vested with the power to make by-laws, and regulations touching the disposition and management of the stock, property and estate of the company, not contrary to the charter, or the laws of the state, or of the United States—the transfer of the shares—the duties and conduct of their officers and their servants, and all matters whatsoever which may appertain to the concerns of such company.

“ By the twentieth section, the act might be amended, altered, or repealed, at the pleasure of the general assembly.

“ That in the exercise of the powers conferred by the charter, a resolution was adopted by the stockholders to the following effect. (Book of Records, Nos. 20 and 21.)

“ ‘ *Transfer and Certificate of Stock.*

“ ‘ The principal transfer office shall be in the city of New Haven, but transfer agencies may be established in the cities of New York and Boston, by resolution of the board of directors; and all transfers of stock at any office shall be made under and in

compliance with such rules and regulations, and by such instruments of assignment and transfer (which need not be under seal) as may from time to time be made, ordered and appointed by the board of directors.

“ ‘Certificates of stock, shall be in such form, and issued under such rules as the board of directors may from time to time appoint and direct.’

“That the directors adopted the form of transfers, certificates, and blank powers of transfers, and ordered their general use.

“On the 3d of February, 1847, the following resolution was adopted by the directors: ‘The receipts and certificates of stock on the books at New Haven to be signed by J. E. Sheffield, as transfer agent; at Boston, to be signed by J. E. Thayer & Brother, as transfer agents; at New York, to be signed by Robert Schuyler, as transfer agent.’

“That upon the evidence before me, if the shares thus fraudulently issued are admitted, the shares of the stock of such company would be increased to the number of 47,497, and the nominal value of each share would be about \$63.80, and that upon such estimate the 370 shares transferred to the plaintiffs would be worth the sum of \$23,039.60.

“From all which facts thus found, being material facts in the case, I have concluded as matter of law:—

“1. That the Bank of Commerce, and the defendant as its president, had a right to retain the amount standing to the credit of the firm of R. & G. L. Schuyler, on the 30th day of June in the year 1854, in part discharge, and satisfaction of the sum made payable by the stock notes, or one of them given by such firm for moneys loaned to them by such bank.

“2. That the claim of the plaintiffs against the defendants, if the same could in any way be sustained, would be restricted to a claim to recover the sum of \$15,000 with interest, they being bound to restore or allow to the Bank of Commerce, the sum of \$10,000 held by them on the said 30th day of June, and the 1st day of July, 1854, and paid out to the plaintiffs upon the check of R. & G. L. Schuyler on the latter day.

“3. That the plaintiffs would have a right to recover such sum of \$15,000 with interest, had it been duly established in this case that the certificate for stock of the New York and New Haven

Railroad Company, for 370 shares, delivered to them with a power of attorney to transfer the same, was wholly valueless, illegal, and void, and conferred no right or interest whatever in or against such company, its property, or franchises.

"4. That the plaintiffs did, in and by the possession of such certificate and power of transfer, acquire and became entitled to a right to be admitted as stockholders of such corporation, called the New York and New Haven Railroad Company, in common with all the other stockholders thereof, whose rights are admitted or shall be established; and that their right is in proportion to the whole number of such stockholders allotted and divided upon a capital of \$3,000,000; and that thereby such plaintiffs received what upon the evidence appears a full consideration for what they advanced to or could in any view demand of the Bank of Commerce upon the transaction in question.

"5. That there is no ground to make the plaintiffs responsible, or vary their rights or position by reason of any knowledge of the fraudulent issue and employment of the stock in question.

"Therefore it is ordered and adjudged that the plaintiffs' complaint be dismissed with costs to the defendants.

"To the opinion of the court and order dismissing plaintiffs' complaint, the plaintiffs excepted; judgment having been entered on the decision, the plaintiffs appealed from it to the General Term."

H. Ketchum and H. Ketchum, Jr., for the plaintiffs, made and argued the following points:—

I. Plaintiffs have a right to retain the \$10,000, because they were entitled to it when the check was presented previous to the completion of the contract. Because,

1st. Defendants held the money as trustees for plaintiffs. The money was specially deposited by Schuylers to pay the plaintiffs. They had constructive knowledge, at the time the money was deposited, by law and by the usage of bankers, of the use for which it was intended. (Bailey on Bills, 331; Chitty on Contracts, 5 Am. ed., 19, 20; *Church v. Clark*, 21 Pick. 310; *Beckwith v. Union Bank*, 4 Sand. S. C. 604; *Whittaker v. Bank of England*, 1 Crompton, M. & R. 753. They had notice previous to the deposit

that the Schuylers intended and had promised to pay, through them, \$10,000 to plaintiffs. On the same day money was deposited enough to pay \$10,000, without directions not to apply it to any other use. In this state of things by law and the usage of bankers, they are presumed to have knowledge that the deposit was made for the express purpose of paying it to plaintiffs.

2d. Defendants had no lien on the funds of Schuylers in their hands, and were, therefore, bound to pay them over upon their order. 1. The notes were not due, and without this defendants had no lien. (Cross on Lien, 43 marg.) (a) No demand of payment of them had been made. This was necessary to render the notes due. (*Wilson v. Little*, 1 Sand. Law R. 351; 2 Comst. 443; 2 Kent's Com. 745 and 746, 7th edition; *Stearns v. Marsh* and another, 4th Denio, 227.) (b) If they could be rendered due without demand, and by a simple operation in the mind of the holder, defendants' acts must have been such as to show that this operation had taken place. Their acts show the contrary to this. 1. By not indorsing the balance in the bank upon the back of one of the notes, as they had been in the habit of doing with other part payments. 2. By not selling the stock at public or private sale, as they were authorized to do on non-payment of the notes. 3. By requiring the consent of the Schuylers before transferring the securities.

3d. They waived their lien by taking a special security for the payment of the loan. (16 Vesey, pp. 278 and 279; 6 id. 759; *Hewison v. Guthrie*, Bing. New Cases, 759; Story on Agency, §§ 354, 362; 1 Stephens, 914.)

If either of the above propositions is correct, then plaintiffs were entitled to receive the money upon the first presentation of the check, and are entitled to retain it, now it is in their possession.

II. The contract ought to be rescinded, because,—

1st. It had its origin in an attempt to get possession of funds wrongfully detained from plaintiffs by defendants, as shown in point I.

2d. It was made upon a misrepresentation of the defendants that the notes were due. This was one of the main incentives to the contract, because (a) plaintiffs would not have entered into the contract but to obtain possession of the \$10,000. Had they

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known that the notes were not due, they would have enforced payment of the money which was their right, without giving a consideration for it. (b) Plaintiffs, being bankers, would not have made the arrangement, had they not supposed they could have recovered their money when they pleased, by selling the stock without notice. This they could not have done if the notes were not due.

3d. It was made upon a misrepresentation that they held stock in the New York and New Haven Railroad Company at seventy, when, in fact, they held no such stock, but merely a fabricated certificate which represented no stock. (See *Mechanics' Bank v. New York and New Haven Railroad Co.*

D. Lord and *B. D. Silliman*, for the defendants, made and argued the points following:—

I. 1. On the 30th June, 1854, when R. and G. L. Schuyler failed, they were indebted to the Bank of Commerce in the balance of \$25,000 of principal, on the two notes of April 6 and May 6, of which the latter was for \$15,000, payable on demand at the bank.

2. Demand, especially applicable to the latter, was in fact made on the 30th of June, for payment of these notes. (3 Kent's Com. 98, and note; Story on Prom. Notes, § 29; *Newman v. Mohawk Ins. Co.*, 13 Wend. 268; *Cornell v. Moulton*, 3 Denio, 13; Bailey on Bills, ch. 9, p. 201, Boston edition, 1836; *Field v. Nickerson*, 13 Mass. 131; *U. S. Bank v. Smith*, 11 Wheat. 171; *U. S. Bank v. Carneal*, 2 Peters, 543; *Saunderson v. Judge*, 2 H. Blackstone, 509; *Ogden v. Dobbin*, 2 Hall, 112.) The other note was duly demanded.

3. The defendants, having this claim against R. & G. L. Schuyler, had a right to apply the cash to their credit, on the 30th June, to this note.

4. The check for \$10,000, held by plaintiffs, would form no assignment of the fund on which it was drawn, until it had been accepted or paid. (*Chapman v. White*, 2 Selden, 412.)

5. On the presentment of the check at 1 o'clock on 29th June, the drawers had not funds to meet it, and it was refused payment.

The check was not left with defendants as a warrant to retain

moneys which R. & G. L. Schuyler might deposit, but was taken and kept by the plaintiffs; on which they could have sued the drawers as on a dishonored check.

6. When the check was presented next, on the 1st July, the defendants had, by right, appropriated the cash of the drawers, R. & G. L. Schuyler, to the claim on the notes.

7. The note for \$15,000, payable on demand at the bank, was a legal ground on which to claim the application of the cash funds of R. & G. L. Schuyler, without any actual demand. (2 Kent, 640, note C, 641; Cross on Lien, 316, Law Lib. v. 18; *Davis v. Bowsher*, 5 D & E, 488; *Jourdain v. Lefevre*, 1 Esp. 66; *Bent v. Puller*, 5 D & E, 494; *Chapman v. White*, 2 Selden, 412.)

II. 1. The defendants were mere bailees of the certificates of stock, taking it *bona fide* to secure advances. They so held it subject to the order of R. & G. L. Schuyler, the proprietors; and this relation of the defendants to the certificates was known to the plaintiffs.

2. The defendants refused all negotiation in relation to the certificates of stock, except to have their debt paid and the pledge redeemed by R. & G. L. Schuyler, the declared principals.

3. The defendants did no more than submit to a payment, creating a redemption, procured by the plaintiffs on an order of R. & G. L. Schuyler, as known owners; and the amount the defendants received was payment of a debt and not the price of a sale or transfer. (2 Kent, 577-579; Story's Bailment, 197; 2 Ld. Raymond, 915-17.)

4. The payment was received *bona fide* and without any warranty, deceit, or misrepresentation on part of the defendants; it cannot be recalled on part of the plaintiffs, in consequence of any transactions between them and R. & G. L. Schuyler.

5. Even had this been a sale by the defendants of the pledge, no warranty would have been implied. (*Morley v. Attenborough*, Welsby, Hurlston, and Gordon, 3 Ex. Rep. 499; *Chapman v. Speller*, Queen's Bench, Feb. 26, 1850; Law Jour., Cases at Com. Law, N. S., vol. xix. part 2, p. 239; *McCoy v. Artcher*, 3 Barb. S. C. R. 323.)

III. The certificates of stock received by the plaintiffs were binding upon the New York and New Haven Railroad Company, and gave the plaintiffs a right against them to so much stock or

the value thereof for security of their transaction—in substance therefore there was no failure of consideration.

1. The plaintiffs, if they succeeded to the title of the defendants, were *bona fide* purchasers without notice.

2. The certificates in defendants' hands were signed by the officer appointed by the company to sign such certificates; and these were in the form always used by the railroad company since its organization.

3. The certificates were intended to be assurances to all dealers to whom they should be delivered on good consideration, and bound the company. (See the printed assignments forming part of the certificates.)

4. The stock was recognized by a transfer on the books of the company, to the defendants.

5. The plaintiffs have a valid claim against the company to the extent of the value of the stock, for their advances. (*Davis v. Bank of England*, 2 Bing. 393; 9 E. C. L. R. 44.)

IV. The plaintiffs have not proved the certificates of stock in question not to be true certificates of actual stock.

1. There was a parcel of 550 shares proved by plaintiffs to be valid, placed to R. & G. L. Schuyler's credit on the 1st of February, 1854.

2. The same witness proves that this parcel was the supply for the first transfers afterwards.

3. Prior to 10th of February, the date of defendants' certificate for 200 shares, there was no other transfer, so that the defendants' certificate of this date was true—and prior to 4th of March, the date of defendants' certificate for 170 shares, the transfers were $(110 + 15 + 65 =)$ 190 shares, which, added to the 200 of defendants', made but 390 out of 550 shares.

4. The stock certificate for 170 shares to plaintiffs of March 4, is not shown to have been issued before that of defendants' of same date.

And if this certificate had been issued before that of the same date of defendants', still it created only a deficiency of 10 shares.

5. The plaintiffs' evidence as to the falseness of the certificates is wholly insufficient. 1st. It rests on the stock ledger account alone, and this takes no notice of certificates issued not returned

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on transfers on the books, although outstanding and transferred by the indorsed form of assignment. 2d. The plaintiffs cannot claim that the transfer of undeniable stock shall be applied to the balance of over transfers; for, if they deny the validity of such over transfers against the railroad company, the latter have no claim on any such balance; or, if they admit such validity, then the stock the plaintiffs received from the defendants is valid.

V. Plaintiffs claim that to enable them to procure payment of their \$10,000 check, they were induced to advance the amount which they did, and take up the note and receive the stock. They thus paid \$25,334 66

The market price of the stock when the transfer was made by defendants to plaintiffs was 81 cents. Thus, if plaintiff received but 360 (instead of 370) shares, the same would amount to 29,160 00

Leaving a surplus to plaintiffs of \$3825 34

VI. The plaintiffs have not shown that the railroad company disclaim the stock in question. They have shown no demand on the company to recognize it, or any refusal by the company so to do. The action is, therefore, premature. The plaintiffs are not at liberty to volunteer a repudiation of the stock which the company may not see fit to make.

VII. As between the plaintiffs and defendants, the former had better knowledge than the latter as to the genuineness of the stock. Mr. Ketchum (one of the plaintiffs) being a director and officer of the railroad company, and as such being bound and presumed to know the state of its affairs. His knowledge charges his partners with like knowledge. (Angel on Corporations, 306; *Verplanck v. Merch. Ins. Co.*, 1 Edwards, 87; *Scott v. Depeyster*, 1 Edwards, 513; *Bayless v. Orme*, 1 Fearne Miss. R. 175; Collyer on Partnership, § 443; *Fulton Bank v. N. Y. and Sharon Canal Co.*, 4 Paige, 128; Lord Worthington, 2d Eden. 303.)

BY THE COURT. BOSWORTH, J.—We do not understand that the plaintiffs claim the right to have a new trial, on the ground that the facts, specially found by the Judge, before whom this action was tried, are not warranted by the evidence. The practical

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question presented by the appeal is this: Do the facts, found by the Judge, and admitted by the pleadings, warrant the judgment appealed from?

The check of the 29th of June, 1854, drawn by R. & G. L. Schuyler, on the defendants, was presented for payment about one o'clock, P. M., of the day of its date, and payment of it was refused. The refusal was justified by the fact, that the drawers had not then sufficient funds in bank to pay it. According to the facts found, the check was next, and again presented to the defendants for payment, on the 1st of July, before eleven o'clock, A. M., and about that hour it was returned to the City Bank, from which it had then come to the defendants, and was returned as not being good.

In the mean time the drawers had failed. The defendants knew of such failure on the 30th of June, and on that day instructed their teller not to pay any checks of the Messrs. Schuyler, which might be presented.

On the 29th of June, about six minutes before three, P. M., a deposit was made with the defendants by the Schuylers, to their credit, of \$9,000. This deposit, with the previous balance to their credit, made an amount a little more than sufficient to pay the \$10,000 check. Unless these facts created a right in favor of the plaintiffs, to have enough of the deposit applied to pay the check, when it was last presented, and a right of action against the defendants, after such refusal to pay, for the amount of the check, the plaintiffs do not show that they had a cause of action against the defendants at any time, unless one accrued from the subsequent transactions had on the 1st of July, between the plaintiffs, the defendants and the Schuylers.

We shall consider this latter question first. As we read the facts found, the defendants did not represent that payment of the stock notes had been demanded, nor that they were due. In answer to the inquiry, why the check was dishonored? the defendants' cashier, replied, "because the bank had a loan demand on the drawers, which would absorb the whole amount of the credit of the firm."

If it would be a material matter, in determining a party, to take a transfer of these stock notes, and the collaterals deposited to secure the payment of the money named in them, that a de-

mand of the payment of them had, or had not been made, there was no misrepresentation with respect to this point. So, too, if it be conceded, that as matter of law, they would not become due, so as to justify a sale of the stock, until a demand of payment and refusal to pay them, there was no misrepresentation on that point. Whether payment had, or had not been demanded, does not seem to be very important, regarding it merely as an operative inducement to such a transaction as occurred. The Schuylers had failed. This was known to the plaintiffs as well as to the defendants, and payment could have been demanded at any moment, as they resided in this city. The plaintiffs knew that the collateral security held by the defendants was something which the Schuylers had pledged. They undoubtedly supposed the defendants held actual stock, or perfect evidence of a right to it. The defendants as fully believed the same thing. But the defendants did not propose, or accede to any proposition to sell to the plaintiffs any stock, or the stock-notes. When asked "whether an assignment of the securities would be made, and the check paid, upon the discharging the loan?" the reply made by the officer of the bank was, "that they could do nothing without the consent or order of Messrs. Schuylers."

The plaintiffs then obtained a written order from the Schuylers, upon the defendants, to deliver to the plaintiffs three hundred and seventy "shares of New Haven Railroad Company stock, upon their paying our notes, for which said shares are pledged." By what arrangement between the plaintiffs and the Schuylers this order was given, the case does not disclose. Whether the plaintiffs bought the stock absolutely of the Schuylers for \$25,000, or agreed with them to take up the notes, on receiving a transfer of the pledged stock, does not appear. But whatever the agreement between those parties was, it was an agreement relating to the stock pledged by the Schuylers to the defendants; of its terms the defendants knew nothing, except what Schuylers' order of the first of July imports.

All the defendants wished, or could lawfully claim, was payment of the \$25,000 loan. That being paid, they were willing and could be compelled to deliver the notes, and the stock pledged as security for their payment, to any person the Schuylers might designate.

The amount due to the defendants was paid by the plaintiffs by virtue of an arrangement between them and the Schuylers. The defendants did not sell to the plaintiffs the notes or the stock. By the terms of the Schuylers' order, the defendants were not authorized to deliver the stock to the plaintiffs, except upon the condition of the plaintiffs paying the notes, and on compliance with that condition they were required to deliver it. If the plaintiffs paid the notes, then the defendants were to deliver the stock which the Schuylers had pledged to secure the notes.

The plaintiffs brought this order, and paid the amount due on the two notes, and then the defendants delivered, and were bound, and could have been compelled, to deliver this stock to the plaintiffs. The defendants made all the delivery of which the subject matter was susceptible. They delivered the evidence of a right to the stock, which was all the delivery contemplated, or which, in the nature of things, could be made.

The notes were delivered to the plaintiffs, with a written indorsement on them, to the effect that the defendants had "received payment of Ketchum, Rogers & Bement, and delivered them the securities."

Under such circumstances, we do not see why the defendants should be required to reimburse the \$25,000 to the plaintiffs. If this stock, or evidence of right to it, had never been in possession of the defendants, but had passed directly from the Schuylers to the plaintiffs, upon payment, by the latter, to the defendants, of the \$25,000, we think no such claim would be urged. We do not see how the defendants' liability is varied by the fact that the defendants, pursuant to an order from the Schuylers, which it was their duty to obey, delivered the stock to the plaintiffs, upon their doing what they had agreed with the Schuylers they would do, as a consideration and condition of such delivery. The plaintiffs and defendants severally acted in good faith. The defendants had a right to retain the stock until the \$25,000 was paid, but they had no right to insist upon retaining it after such payment was made. Whether the defendants, on the facts then existing, could have retained the \$10,000 on deposit, as against the plaintiffs, we may assume to be a debatable question, but the defendants, clearly, would have no such right after the \$25,000 was paid. In our

opinion, the conclusions of law, as to this branch of the case, upon the facts found, are:—

1st. The plaintiffs paid for the Schuylers, to the defendants, the amount which the Schuylers owed to the latter.

2d. Such payment was made pursuant to an arrangement between the plaintiffs and the Schuylers, as the principals and sole contracting parties.

3d. The delivery to the plaintiffs, by the defendants, of the securities, called stock, was in consequence of and in obedience to the order of the Schuylers, and by authority of it, and was not in execution of any contract of the defendants, to sell and deliver to the plaintiffs three hundred and seventy shares of stock.

4th. The defendants were paid no more, as a condition of delivering the stock, than it was his right to demand, before they could have been compelled, by the Schuylers or any other person, to surrender it.

5th. If the plaintiffs paid this money for a consideration which has failed, or by reason of the suppression by the Schuylers of the information that the stock was false and spurious, their only remedy is against the Schuylers, on whose account it was paid.

If these views are sound, the inquiry whether an action could have been maintained by the plaintiffs against the defendants to recover the amount of the check, after it had been presented for payment on the first of July, and the refusal at that time to pay it, becomes unimportant to the proper determination of this appeal. The check has been paid by the defendants; but, unless a discrimination can be made between this case and *Chapman v.*

White (2 Seld. Rep. 412), no right of action arose in favor of the plaintiffs against the defendants by reason of the presentment of the check and the refusal to pay it. The instruments, ordering the parties to whom they were directed, to pay the sums named in them, are in the same form in both cases. Both were drawn on a bank. The drawer, in each case, had moneys to his credit in the bank on which the check or bill was drawn; but in neither case was the deposit a special one. The moneys deposited in each case, from the time of the deposit, were the property of the depository. Although lost, stolen, or burned, without any fault of the depository, the latter would continue liable to the depositor for the amount. The right of the depositor was a mere chose in

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action. We do not see why *Chapman v. White* is not controlling on this question. If it is, the plaintiffs had no right of action against the defendants for the \$10,000 at the time the \$25,000 loan was paid, and the securities pledged for the payment were surrendered. Whether, if an assignment had been made by the Schuylers to the plaintiffs, on the first of July, of all claims of the former against the defendants, by reason of the deposits made by the Schuylers with the defendants, and the plaintiffs as such assignees had brought an action to recover the sums deposited, the defendants could have offset the notes, is a question which does not arise. No such assignment was made, and the check itself did not operate as an assignment, or create a lien on the amount standing to the credit of the Schuylers, until the check was accepted or paid.

But it by no means follows, that although no such demand of payment of the stock notes had been made, as would have authorized a sale of the pledged stock, that an action would not have lain, at the suit of the defendants against the Schuylers, upon the notes, nor that, if the Schuylers had sued the defendants on the first of July, to recover the balance standing to their credit, that the stock notes might not have been set-off. Notes payable "on demand" are due at their date; interest accrues, and the statute of limitations begins to run from that day. They may be sued without a previous actual demand. It is not apparent why the Bank of Commerce, if the Schuylers had assigned their claim, by reason of their deposits, to the plaintiffs, on the first of July, and the latter had thereupon brought an action against the bank, might not have set-off the stock notes. The Schuylers had failed on the 30th June. The bank knew of it, and on that day sought the Schuylers, and, failing to find them, directed its teller to pay no more checks drawn by the Schuylers. The defendants have done enough to show their purpose, to insist on the right to apply the amount of Schuylers' credit to satisfy *pro tanto* these notes. We do not think the Schuylers could have made an assignment of their claim, by reason of their deposits after that date, which would preclude the defendants from setting-off the notes.

But although a note is by its terms due, yet property pledged for its payment cannot be sold until after payment has been actually demanded and a reasonable time to pay has elapsed. If

the makers cannot be found, so that a demand of payment can be made of them, a resort to judicial proceedings must be had to authorize a sale. (*Stearns v. Marsh*, 4 Denio Rep. 227, 230, and 231; *Wilson v. Little*, 2 Comstock R. 443.)

Upon the facts as found, we think the conclusion of law is, that no such demand had been made as would authorize a sale, on the 1st of July, of the pledged property. If the defendants had sold it that day, the sale would have been unauthorized.

This view strengthens the conclusions before stated, that the transactions, which resulted in payment of the loan and surrender of the stock, were, so far as they related to such payment and surrender, matters as to which the plaintiffs and the Schuylers were the contracting parties.

The defendants having received no more than was their strict right, and having received that as a payment in behalf of their debtor, and being guilty of no fraud, the judgment appealed from should be affirmed, but not for the reasons assigned in support of it by the learned Judge by whom it was rendered.

WOODRUFF, J. (Dissenting.)—I concur with my brethren in their views respecting the right of the defendants, upon the facts found in this case, to refuse payment of the check for ten thousand dollars held by plaintiffs; but, in regard to the claim of the plaintiffs to relief from the consequences of the arrangement made with the defendants in order to obtain the payment of that check, I am constrained to dissent from the opinion pronounced herein.

The difference, however, between myself and my brethren is not so much in respect to the existence and soundness of the rule by which the case, in my judgment, ought to be governed, as on the question whether the facts of the present case call for its application.

I believe we are fully agreed that the doctrine of Courts of Equity is well settled, that a mutual mistake of facts which are material, which enter into the consideration of the parties, and are in that sense a cause of a contract, is a sufficient ground to avoid it.

This general rule is not, so far as I understand, denied by the defendants' counsel.

Under such circumstances, I do not deem it necessary to cite authorities to a rule often, and, I may say always, recognized as one especial head of equity jurisdiction, and, in appropriate cases,

acted upon with scarcely less freedom by courts of law, both in England and in this country. (See 1 Story's Eq. Jur. § 141 and onward, and cases in notes; 1 Spence Eq. Jur. p. 632 and onward; Fonbl. Eq. 116, etc., 120; and cases at law, in application of this rule, might be greatly multiplied. Some are cited in the opinion of Mr. Justice Hoffman in this case, at Special Term; and see Story on Sales, § 145 and onward, and cases in notes; and Story on Contracts, § 419, etc., and cases in notes; *Wilkinson v. Johnson*, 3 B. & C. Rep. 429; *Kelly v. Solair*, 9 Mees. and W. Rep. 54, and cases cited; *Merkle v. Hatfield*, 2 J. R. 455; *Canal Bank v. The Bank of Albany*, 1 Hill Rep. 287.)

As, in my opinion, the plaintiffs are entitled to relief upon the doctrine above stated, I deem it also unnecessary to inquire whether, in strictness, the transaction between these parties was to be deemed a sale of stock by the defendants to the plaintiffs, or whether there was in the transaction an implied warranty of the genuineness of the stock. Still less is it necessary to impute to the defendants any intentional misrepresentation or want of entire fairness in their dealing with the plaintiffs.

It is sufficient for my purpose to take the facts as found by the Justice before whom the action was tried; and if they show a bargaining between these parties—a consideration moving to each in the arrangement which they had with each other, and an entire mistake or error in regard to the subject to which the arrangement related, and one which vitally affected the contract as one of its inducements, the general rule above stated seems to me to require that the contract be rescinded, and the parties be restored to the position in which they were before it was made; and this accords with what I cannot but claim to be eminently just.

The inquiry, therefore, which I deem it alone necessary to consider, is, whether the facts found establish a case, within the rule referred to?

The very basis and ground of the negotiation (so far as related to stock) was, that the defendants held 370 shares of stock in the New York and New Haven Railroad Company.

This was the distinct and unqualified representation of the defendants to Mr. Bement. No certificate was produced or exhibited; no confidence in any other title than that of the defendants was directly or impliedly invited.

In truth, at that very time, whatever evidence of title was in the possession of the defendants, represented, not that Schuyler, but that the defendant as president, or the bank, was the holder of 370 shares of such stock, in precise accordance with the representation made to Mr. Bement.

However honestly the representation was made, that representation was the starting point in the negotiation which ensued; it was in mutual belief that there was stock, real stock, and just 370 shares thereof, that the parties treated together on the subject.

In that mutual belief, and, as the result has shown, under that mutual mistake, in regard to a matter that formed the inducement to Mr. Bement, and the only inducement to what followed, what was done?

“An arrangement was made” between them, subject only to the consent of the Messrs. Schuylers, for the payment to the defendants, by the plaintiffs, of \$25,000, and the transfer to the plaintiffs, in consideration thereof, of the 370 shares of stock, and, as a consequence resulting from this arrangement, (the whole sum due to the bank, the defendants, being paid to them,) the amount of the check held by the plaintiffs, being then on deposit, would be relieved from any claim of the defendants, could properly be paid, and would be paid.

Here, then, was a mutual mistake, and an arrangement founded therein. It was a mistake in a particular vital to the transaction. I need not pause to argue that, had the actual character of the stock been known, the plaintiffs would not have consented to it, and the defendants would not have, for a moment, supposed such an arrangement possible.

Was there a consideration moving between the parties, prejudicial to the plaintiffs and beneficial to the defendants? The answer is, unhesitatingly and incontrovertibly, yes, both.

The plaintiffs parted with their money. The defendants received full satisfaction of their claims. Assuming, for the purpose of this last inquiry, that the stock was all that the parties believed it to be, still there was consideration, and a consideration beneficial to the defendants, in this arrangement; they received certain payment. True, they supposed the debt well secured; and, if the stock was genuine, they had good reason for their belief; nevertheless, there was benefit to them in the actual payment,

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which at once relieved them from all the possible hazards of depreciation in value, or other event which could affect their position.

Besides, when the relation which the plaintiffs and the defendants at that moment bore to each other is taken into view, the consideration and the motives prompting this arrangement become even more important.

The plaintiffs held a check of \$10,000, drawn by the Schuylers upon the defendants. It was drawn on the 29th day of June, and an actual deposit was on that day made by the Schuylers, sufficient to make their account good—the balance to the credit of the Schuylers was sufficient for its payment. In the negotiation referred to, the plaintiffs were actually claiming, that, although nothing was said by the Schuylers, on making the deposit, amounting to a specific appropriation of the money, with the defendants' assent, to this particular check, yet that the deposit was in fact made for the very purpose of meeting the check, and, therefore, that the plaintiffs were entitled to have that check paid, and the defendants had no right to withhold that money; and further, that the defendants had no right to appropriate that money to the payment of the notes which they held.

Now, although we are of opinion, as already suggested, that, in point of law, this claim of the plaintiffs could not, upon the facts proved on the trial, have been sustained, still such was the claim urged upon the defendants then and forcibly urged by the plaintiffs' counsel down to this time. It was at the time of the negotiation an existing, pressing claim, and a claim of such importance and plausibility that it might very properly enter into the consideration of the parties; and by the arrangement then made that claim was fully adjusted and the defendants were relieved.

The circumstance that, if that claim had been litigated, we are of opinion that the plaintiffs must have failed, does not change the aspect of the case in this respect. The very purpose of all arrangements, of this description, is to avoid controversy and litigation.

There was, then, in the arrangement then agreed upon, a consideration on both sides—a benefit to the defendants, a prejudice to the plaintiffs; that is to say, a parting with their money upon the chance of realizing it again, on the mutual assumption that the stock was the genuine stock of the railroad company.

What then remained to be done? The consent of the Schuylers was to be procured. Not because any benefit was to result to the Schuylers. Not because it was supposed that this was imposing upon the plaintiffs any further actual burden, but, simply, that it might not be in the power of the Schuylers, afterwards, to say to the defendants, you have dealt with the securities, pledged by us with you, as if they were your own, without our assent; in other words, to relieve the defendants from any liability to the Schuylers in regard to the transactions.

The consent was procured in the form of a distinct direction to the defendants to do what they had arranged to do, subject to such consent.

It is not warranted by any facts found, and it seems to me to do violence to the character of the transaction as it appears upon the evidence, or finding of the Judge, to say by way of supposition, or even to imagine that this consent was the result of a negotiation between the plaintiffs and the Schuylers, by which the plaintiffs became purchasers of the stock from them, or that it was any thing whatever other or more than the procurement of the Schuylers' assent, such as the defendants deemed reasonable for their own protection as against the Schuylers—an assent to an arrangement already made, only subject to such assent—one which did not in any wise prejudice the Schuylers—one for assenting to which they could not, upon any equitable ground, ask to be paid one penny, and which they had no apparent motive to disapprove.

Under such circumstances, it seems to me that it would be doing violence to the obvious character of the transaction, to place any stress upon the idea that possibly the negotiation between the plaintiffs and the Schuylers proceeded upon a sale from the latter to the former, which converted the transaction into a dealing between the plaintiffs and the Schuylers in respect to this stock. Nothing indicates that such was the actual fact, and if there was any such dealing it should have been proved by the defendants.

But more than this, if the Messrs. Schuylers had been brought into the presence of both the parties, and had united with the defendants in their representation that three hundred and seventy shares of stock were held by the latter—deceiving alike both the plaintiffs and the defendants—and thereupon the plaintiffs had advanced their money to the defendants, I cannot perceive

that the claim of the plaintiffs to be reinstated in their former position would be less strong. The consideration moving between the plaintiffs and the defendants would still be precisely the same, and the position of the parties would be simply this: the fraud of the Schuylers has induced the mutual mistake under which the defendants have obtained the plaintiffs' money. Both the plaintiffs and the defendants acted under the belief that they were dealing with actual stock. Each knew that the other was so dealing.

In this connection it is of some materiality to add, that up to the very close of the transaction, stock was the subject of the treaty. The plaintiffs were acting under the defendants' representation that they held stock, and when the evidence of title was produced it was in the name of the defendants; it had been transferred previously to them, and the certificate imported title in them. In this respect, it is not liable to the suggestion that the plaintiffs were dealing with, or received, or placed their reliance upon a certificate that Robert Schuyler had stock. They acted, and, as between these parties, they were warranted in acting, upon the double representation that the defendants had title to so much stock.

It was urged that the plaintiffs knew that they were dealing with pledgees who had received the supposed sureties from the Messrs. Schuylers, and that in the whole transaction, and especially in requiring the assent of the latter, they clearly indicated that they consented to do nothing, and that, in truth, they did do nothing, but transfer to the plaintiffs such interest and such property as they had.

Doubtless they might have so guarded their act, by reservations or qualifications, as to have rested safely in this view of the subject. But be it observed that this is not a mere question of warranty; the right of rescision on the ground of mutual mistake, and the right to rescind for a breach of warranty, are not coincident. Here the thing in regard to which the parties supposed they were dealing had no existence. The plaintiffs were not buying a certificate, they were not proposing for a transfer of a certificate, down to the moment of closing the transaction they saw no certificate. Stock, and nothing else, was the subject of which they treated.

But suppose a pledgee, either in pursuance of his power to sell

the pledge for the satisfaction of his claim, or by the express assent of the pledgor, offers at public sale one hundred sacks of wheat, and even announces that he sells only his right, title, and interest therein as pledgee, and that the pledgor has assented to the sale—but he nevertheless calls the subject of the sale one hundred sacks of wheat—and on such sale he receives the money of the purchaser, who, when the sacks are delivered, finds their contents not wheat but some other article, it is not, I presume, doubted that the purchaser may recover back his money. Now, although the transaction under consideration may not have been in fact, and may not have been regarded by the parties as a sale, it is not apparent to my mind that, in the principles affecting the right to rescind the arrangement, there is any thing which makes this case in that respect to differ from the other.

In this view of the subject, I regard it as of no importance that when the transaction was closed, the defendants wrote upon the notes, for which they held as security the supposed stock, a receipt in form, acknowledging payment from the plaintiffs, and so delivered them to the plaintiffs. This fact does not appear by the finding of the court, but it was proved without contradiction, and we may probably be at liberty to notice it. The only effect of this upon the plaintiffs' rights, as against the Schuylers, was that their claim on the Schuylers would be for so much money paid to their use, and for this they would hold the supposed stock. And, on the other hand, on a rescision of the transaction, the defendants, by the very facts here found, would be remitted to their original rights, according to the very terms of the notes themselves.

Again, the defendants are not prejudiced by a rescision of the transaction; within ten days, the fraud of the Schuylers being discovered, the plaintiffs offered back the supposed stock. No change had occurred in the position of the parties. No insolvency had intervened, for the insolvency of the Schuylers was prior to the arrangement; and the full restoration of the defendants to their original position was the immediate effect of the return of the securities to them, in view of the discovery of the fraud which was then apparent.

I have only to add that, in my conclusion, I concur with that of the Judge at Special Term, in regard to the plaintiffs' right to rescind this transaction, a conclusion of law which he did not deem

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applicable, because he deemed the stock valid, though of less value than the parties supposed. The plaintiffs, in my opinion, did not obtain that for which they treated—they did not receive that which the defendants supposed they were giving. Both parties acted under a total misapprehension in regard to the subject to which the arrangement related, induced, it is true, by the fraud of another, but that was a fraud which had already been effectual to deceive the defendants, and had wrought all the prejudice it could effect upon them; and it was none the less a mistake because it originated in such a fraud.

The mutual error was in a particular vitally affecting the transaction, and but for the error the plaintiffs would have in nowise consented to it.

In my judgment, the case is within the rule requiring a restoration of the parties to their former position, and that the defendants should be adjudged to restore the money received, with interest, and receive back the supposed securities. This seems to me to accomplish what is most obviously just.

The reciprocal obligations of the plaintiffs, to restore also the \$10,000 paid upon the check, make it only necessary to adjust the balance at \$15,000, and interest, to be repaid by the defendants.

EDDY v. JUMP, impleaded.

When the indorser of a note resides in the place where it must be presented, and payment of it demanded, notice to the indorser, as the general rule, must be served on him personally, or by leaving it at his residence or place of business. The only exceptions are that, when the indorser lives in the same city or town in which presentment and demand must be made, but at some point remote from the place of presentment, between which there is a communication by mail, the notice may be served by mailing it to him, directed to him at a post-office where he usually receives his letters and papers.

(Before BOSWORTH and HOFFMAN, J.J.)

February 3; February 21, 1857.

THE facts of the case, and the manner in which the questions decided arose, are briefly, but fully, stated in the opinion of the

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court. The action was tried in November, 1856, before Chief-Justice Oakley and a jury.

William Norton, for plaintiff.

Alexander P. Sharp, for defendant.

BY THE COURT. BOSWORTH, J.—The defendant, Jump, is sued as indorser of two several promissory notes. The only question is, whether the notice of presentment for payment and of non-payment was so served as to charge him as indorser.

Each note, by its terms, was payable at the American Exchange Bank in this city. Jump resided at No. 88 Avenue D, in this city. The notices of protest were served by depositing them in the post-office in this city, directed to him at No. 88 Avenue D, city of New York, and paying the postage thereon.

There was no evidence that Jump actually received it, nor of any act done to secure a delivery of it to him except that already stated.

The Judge who presided at the trial directed a verdict to be entered for the plaintiff, subject to the opinion of the court at General Term, upon the question of law, whether that was a good service, or whether the notice should have been served on the defendant personally, or, if he could not be found, by leaving it at his residence or place of business, with liberty to the court, at General Term, to dismiss the complaint if so advised.

When the indorser resides in the same place where the presentment or demand must be made, the general rule is, that notice to the indorser must be served on him personally, or by leaving it at his residence or place of business.

The only exceptions to this rule are, that when the indorser lives in the same town or city in which the demand must be made, but at some point remote from the place of presentment, between which there is a communication by mail, the notice may be served by mailing it to him, directed to him at a post-office where he usually receives his letters and papers.

In this case, so far as the evidence given justifies any conclusion, the notice was not deposited to be forwarded to the defendant by mail to some post-office, nearer his residence than the place

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of presentment, at which he usually received his letters and papers, but to remain there until called for.

This case, therefore, presents precisely the same question which was decided in *Ireland v. Kipp*, (10 J. R. 490, and 11 id. 231,) without any fact being proved to bring it within the exceptions to the general rule, that the service of the notice must be personal when the place of presentment and that of the residence of the indorser are the same.

In *Ransom v. Mack*, (2 Hill, 587-590,) the rule is stated thus: "Whether mail service is good or not does not depend upon the inquiry, whether the person to be charged resides within the same legal district, but upon the question, whether the notice may be transmitted by mail from the place of presentment, or demand, to another post-office where the drawer or indorser usually receives his letters and papers?" (See *The Montgomery County Bank v. Marsh*, 3 Seld. 481.)

In *Bowling v. Harrison*, (6 How. U. S. R. 248,) substantially the same rule was declared.

The service of the notice proved to have been made, was insufficient to charge the defendant, as indorser, and the complaint, pursuant to the stipulation contained in the case, must be dismissed, unless the plaintiff elects to have a new trial, which is granted on his paying the costs of the trial and of the subsequent proceedings. The election to be made on settling the order, so that it may be entered in conformity with such election.

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When a plaintiff becomes the grantee and owner of premises, at the time occupied by the defendants, under an unsealed and unexpired lease, at a specified sum per annum, and becomes such owner, and an assignee of such lease, with the assent of such tenants, and they continue to occupy the premises after notice of such facts, and that the plaintiff is their landlord, and without objection, the plaintiff can recover for subsequently accruing rent, on a complaint which merely states that he is owner of the premises, and that the defendants occupied them at their request and by his permission, and that the use of them is worth \$284.14. But he can only recover at the rate specified in the lease under which the defendants entered. And they cannot set-off against rent accruing

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subsequent to their assent to occupy, as tenants of the plaintiff, a debt due to them prior thereto, from their lessor.

It is not error to admit, after a plaintiff has rested and the defendant has entered on his defence, proof of a cause of action, in support of which no evidence had been given when the plaintiff rested, when the defendant is not thereby prejudiced in establishing any defence he may have thereto.

The defendants, having assented to occupy, as tenants of the plaintiff, after notice to them that he was the assignee of the lease under which they were occupying, they cannot litigate the question whether the lease was assigned to the plaintiff with intent to defraud the creditors of their lessor. A creditor at large is not in a position to litigate that question.

(Before BOSWORTH and HOFFMAN, J.J.)

February 9; February 21, 1857.

THIS action was tried in February, 1856, before Mr. Justice Woodruff, and a jury. The plaintiff recovered a verdict, on which judgment was entered, and from that judgment the defendants appealed to the General Term.

The facts are fully stated in the opinion of the court.

J. E. Parsons, for plaintiff.

John Graham, for defendants.

BY THE COURT. BOSWORTH, J.—The complaint alleges that the plaintiff is the owner of certain premises, particularly described; that the defendants, at their request, and by permission of the plaintiff, occupied them from the 1st of February to the 1st of May, 1855, and that the use of them was worth the sum of \$284.14.

2d. That plaintiff furnished and delivered sand to the defendants, on their agreement to pay, at the rate of \$3 per week; that for this \$35.50 was due.

3d. That plaintiff carted mud and dirt from the premises, on defendants' agreement to pay the usual and customary price, and that these services, at that rate, amounted to \$26.62.

The answer puts in issue, the allegations of the complaint, as to plaintiff being the owner, and as to occupying under him; and then states, that defendants occupied the premises, under a lease in writing, not sealed, executed to them by one Austen B. Trowbridge; and that, so far as they know, he is the only landlord to whom they are responsible.

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That Trowbridge owes them \$136.81, which they claim to set-off against the rent.

It also puts in issue the allegations as to furnishing sand, and carting mud and dirt.

The evidence shows that the plaintiff became the owner of the premises in December, 1854.

Andrews & Gildersleeve, the plaintiff's grantors, owned the premises prior to the 23d of September, 1852, the date of the lease from Trowbridge to the defendants; that is, they owned the premises, so far as the paper title discloses the true owners. Trowbridge occupied the premises, covered by the deeds to the plaintiff, under an agreement between him and Gildersleeve & Andrews. The premises in question are but a small part of those bought by the plaintiff of Gildersleeve & Andrews.

Trowbridge, while thus occupying them under Gildersleeve & Andrews, leased to the defendants, by an unsealed lease, dated the 23d of September, 1852, the premises in question, for five years from the first of October following, at the yearly rent of \$1075, payable quarterly. The defendants occupied under that lease. The defendants were notified by Gildersleeve, in the presence of the plaintiff, prior to the first of February, 1855, that the plaintiff was their landlord. Trowbridge had no interest in the premises which authorized him to give a valid lease for the term for which he leased to the defendants. Trowbridge does not appear to have claimed any rent of the defendants, or any right to any that accrued after the first of February, 1855.

By a writing, indorsed on a counterpart of the lease from Trowbridge to the defendants, reciting that the plaintiff had purchased the premises, thereby demised from the former owners, and signed by Trowbridge, Gildersleeve & Andrews, they severally assigned the lease to the plaintiff, and all their right, title, interest, claim, and demand therein and thereunder. That writing is dated the 15th of May, 1855.

This evidence established a legal title in the plaintiff, and that he was the owner of the premises during the whole period for which the plaintiff sought to recover; that the defendants actually occupied under the lease executed to them by Trowbridge; that they were informed before the 1st of February, 1855, that the plaintiff was henceforth their landlord. To this no objection

was made, and to that change they must be deemed to have assented. The plaintiff having proved these facts, and the value of the use of the premises, rested.

The defendants moved for a nonsuit, on the sole ground, that the plaintiff having shown the existence of a lease from Trowbridge to the defendants, for the period of five years, and that it not appearing that the lease was not sealed, the plaintiff could not recover, (if at all) under the statute, for use and occupation, without first showing whether or not the lease was by deed.

The court overruled the objection. The defendants excepted, and entered upon their defence. The defendants then produced and proved the lease, and it was unsealed.

The plaintiff when he rested, had given no evidence in support of the second or third cause of action, but subsequently gave evidence tending to establish them, by his cross-examination of defendants' witnesses.

The defendants objected and excepted to the admission of this evidence, on the ground that as the plaintiff had given no evidence in support of these claims before he rested, he could not be allowed to give such evidence after the defendants had entered upon their defence. The defendants proved that Trowbridge was indebted to them anterior to the 1st of February, 1855, to an amount between \$100 and \$200. But there was no attempt to prove any agreement between them that it should be applied in payment of rent thereafter to accrue under the lease. They claimed the right to have this indebtedness applied upon this rent. The right to so apply it, was based on the theory, that the premises really belonged to Trowbridge, and that he had made use of Gildersleeve & Andrews, and of the present plaintiff, to cover up and conceal that interest, by vesting the paper title in them.

Most of the exceptions taken by the defendants, to the rejection of the evidence offered by them, are attempted to be sustained, upon the idea, that upon the trial of this action, the defendants were entitled to the same range of examination, that would be allowed in a proceeding to set aside these conveyances for fraud, and to establish the fact that Trowbridge was the real owner.

All the objections taken by defendants' counsel, may be disposed of by a few general propositions.

The evidence was satisfactory that the plaintiff was owner in

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fee of the premises. The defendants occupied the premises under a special agreement between them and Trowbridge. From and prior to the 1st of February, 1855, down to and until after the 1st of May, 1855, they occupied, under an implied agreement between them and the plaintiff, that henceforth they should occupy as tenants of the plaintiff, and upon the terms of their lease from Trowbridge, as to the rate of compensation.

The statute authorizes an action for use and occupation, as well when the defendants occupy under an implied agreement between them and the plaintiff, as when they occupy under a special agreement. (*Osgood v. Dewey*, 13 J. R. 240; *McKeon v. Whitney*, 8 Hill, 452; 1 Revised Statutes, 748, § 26.)

Under the present system, the plaintiff states, according to the actual truth of the case, facts which entitle him to recover. When there is no material variance between the facts as alleged and proved, he cannot be non-suited, if he proves facts sufficient to constitute a cause of action. The lease having been ratified by the plaintiff, so far, at least, as to permit further occupation at the rate of compensation fixed by it, the plaintiff was limited in his recovery to that sum. There was no variance between the pleadings and proofs.

It was entirely discretionary with the Judge, whether he would allow the plaintiff, after having rested, to prove the small demands constituting his second and third causes of action. There was no proof of its operating as a surprise upon, or prejudicially to the defendants.

It is quite clear, that rent which accrued for the use and occupation by the defendants of the premises, after the plaintiff became the owner of them in fee, and they had consented to occupy as his tenants, could not be off-set against a demand owing to them by their original landlord.

The defendants have not placed themselves in a position to controvert the validity of the plaintiff's title. It is unquestionably valid, as against Trowbridge and the defendants, and all other persons, except those who are in a position, as creditors of Trowbridge or of the plaintiff's grantors, to assail it on the ground that it was vested in the plaintiff with intent to defraud such creditors, or some one or all of them. A creditor at large of Trowbridge cannot, as such litigate that question. (3 Kern. 488.)

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In this view of the case, there was no error in the exclusion of evidence offered, or in refusing to charge, as the defendants requested, or in the parts of the charge given to which exceptions were taken.

The judgment must be affirmed with costs.

H. P. TOWNSEND, Executor of THOS. JOHNSON v. ELY HOPPOCK.

The defendant sued Brooks & Hopkins, had an attachment issued, and on it seized the property in question, being the property of the plaintiff's testator. T. Jackson, and Carr & Burnett, and S. V. Moers, subsequently and severally sued Brooks & Hopkins, and had attachments issued, which were levied on the same property, but without their direction. Judgments were obtained, and executions issued in all of said actions. The sheriff refused to sell on either of the executions, unless indemnified for so doing. Carr & Burnett executed to the sheriff an indemnity bond in their own suit, and executed as sureties one given by Moers in his suit, by the terms of each of which the sheriff was indemnified against the consequences of levying and selling, under the executions, in those two actions. Johnson having, in his lifetime, sued Carr and Burnett for a forcible and wrongful taking of the property in question, the plaintiff, on the 31st of August, 1855, released them from all causes of action whatever. The present action was commenced about the 1st of July, 1852, after all the executions had been issued to the sheriff, and before the execution of the indemnity bonds.

Held, that the cause of action against Hoppock was perfect the moment the property was seized on his attachment, by his orders. That Carr & Burnett, not having participated in that wrongful taking, the release to them could not be construed to include and discharge that cause of action, and, consequently, was no defence to it.

They and Hoppock were not joint wrong-doers, in respect to the taking of the property under Hoppock's attachment. That taking being the ground of the present action, a release of Carr & Burnett from all claims and demands against them, does not extinguish or affect Hoppock's liability to the plaintiff.

(Before BOSWORTH and HOFFMAN, J. J.)

February 8; February 21, 1858.

THE complaint charges that on or about the 14th of April, 1852, the defendant forcibly and wrongfully took from the possession of the plaintiff, certain goods and chattels, of the value of \$500, and claims damages to the amount of \$1000.

The answer puts in issue the allegations of the complaint. It then justifies the taking under an attachment, in an action in the

Supreme Court, brought by the present defendant against Brooks & Hopkins, who, as the defendant alleges, owned the property. The attachment was issued on the 13th of April, 1852, and the goods were seized upon it, on the 14th, by direction of the defendant.

On the 30th of April, 1856, the defendant was allowed to set up by supplemental answer, that the trespass complained of was committed, if at all, by the defendant and John F. Carr, and Mitford B. Burnett jointly, and not otherwise; and that, on the 31st of August, 1855, the plaintiff, by a sealed release, released Carr & Burnet from all claims, demands, and causes of action whatever.

The action was referred; the referee found in favor of the plaintiff, and from the judgment entered on his report the defendant appeals.

The facts are, in brief, these:

1. Johnson bought the goods in question on the 10th of April, 1852, of Brooks & Hopkins.

2. On the 14th of April, 1852, they were taken from the plaintiff's possession, by the sheriff, on an attachment in favor of Hoppock against Brooks & Hopkins, and were so taken by direction of Hoppock.

3. Three other attachments, in suits against Brooks & Hopkins, were received by the sheriff before he seized and removed the goods: one in favor of Thomas Jackson; one in favor of Carr & Burnett, and one in favor of S. V. Moers. They were received in the order in which the plaintiffs therein are here named.

Carr & Burnett are not shown to have given any direction to the sheriff, as to levying the attachment in their favor on this property.

Judgment was obtained by Hoppock on the 24th of June, 1852, in his action against Brooks & Hopkins, and execution was issued on it on the 25th, and delivered to the sheriff on the 26th.

Each of the other attaching creditors obtained judgments in their actions, and issued executions thereon to the sheriff, who received them at the same time he received that in favor of Hoppock, and marked them as received in the order in which the attachments had been issued.

, This action was commenced on, or about the 1st of July, 1852, after all the executions had been delivered to the sheriff.

After all the executions had been received, the sheriff refused to sell under either of them, unless the plaintiff in each indemnified him. Bonds of indemnity, in each action, were given, and were marked by the sheriff as having been received in the order in which the attachments were received. They are all dated the 6th of July, 1852, except the one in the action of Carr & Burnett, and that is dated on the 7th. Carr & Burnett, besides signing the bond in their own action, signed a bond as sureties for Moers, in his action. The bond, in each case, indemnified the sheriff against the consequences of levying and making sale "under and by virtue of the execution."

The sheriff sold the property, and the proceeds paid Hoppock's execution in full, and left \$123.18, to be applied, and which was applied, on Jackson's execution.

There was no interference by Carr & Burnett, in any stage of the proceedings, except signing these two indemnity bonds.

It further appeared that the testator of the present plaintiff brought an action against Carr & Burnett, in which he, plaintiff, declared in the same form as in this, and for taking the same property. Issue was joined in it. On the 31st of August, 1855, the plaintiff having qualified as executor of Johnson, executed to Carr & Burnett a release, general in its terms, of all causes of action whatever, for the sum of \$50, as the release stated. It did not, in express terms, release the present cause of action.

The suit against Carr & Burnett was discontinued, and the consent for the discontinuance of it is dated the 7th of November, 1855.

The referee reported that Hoppock took the property on the 14th of April, 1852, its then value, and gave judgment, in favor of the plaintiff, for that value, with interest from the time of the taking. The defendant appeals. The main point made is, that, under the facts found, Hoppock, and Carr & Burnett, were joint trespassers, and that the release of Carr & Burnett, two of such trespassers, is a bar to an action against Hoppock, their co-trespasser.

H. Burlock, for plaintiff.

E. W. Stoughton, for defendant.

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BY THE COURT. BOSWORTH, J.—This action is brought to recover damages for the forcible and wrongful taking, by the defendant, of certain personal property, from the possession of the plaintiff. The complaint charges, and the referee finds, that it was taken on or about the 14th of April, 1852. It was so taken, by a deputy sheriff, on an attachment issued at the suit of the defendant against Brooks & Hopkins, and was taken by the direction of the defendant.

There does not appear to have been any actual or constructive interference, by Carr & Burnett, with the taking of the property, at the time it was taken. Nothing was done by them which could be construed into an assent, by them, to that act, or into an adoption of it, until they executed an indemnity bond to the sheriff, on the 7th of July, 1852.

The cause of action stated in the complaint, arose prior to that time. All the acts constituting it had been done before that date, and Carr & Burnett had not, up to the giving of the indemnity bond, on the 7th of July, 1852, participated directly or indirectly in those acts. The case made, states as a fact, that this action was commenced about the 1st of July, 1852, by the service of a summons and complaint. The summons is dated the 30th of June, and the complaint was verified on the 1st of July, 1852.

The complaint was, therefore, drawn and verified before the bond of indemnity which Carr and Burnett delivered to the sheriff was executed, and the fact stated in the case, as to the time this action was commenced, taken in connection with the date of the summons and the time of verifying the complaint, imports, that this action was brought before that bond was given.

The cause of action, in this case, was complete, on the taking of the property by the deputy sheriff, on Hoppock's attachment. That act is stated to be the cause of action. In that act Carr and Burnett in no way participated.

The indemnity bond was not required of Carr and Burnett, nor was it given by them to indemnify the sheriff against the consequences of having taken the property on the attachments, or for his subsequent detention of it.

He declined to sell it on the executions which were delivered to him on the 25th of June, 1852, unless the several plaintiffs would indemnify him for so doing.

The bond of indemnity given, recites, the recovery of a judgment against Brooks and Hopkins, the issuing of an execution thereon, and in terms, is conditioned to indemnify the sheriff against the consequences of levying and selling "under and by virtue of said execution."

This bond, by its terms, cannot justly be said to adopt any act, or to express the assent of Carr and Burnett to any act of the sheriff anterior to the levying of the execution, described in such bond.

But that act forms no part of the cause of action stated in the complaint. That cause of action, as has been already mentioned, accrued upon the taking of the property on the 14th of April, 1852.

The referee has charged the defendant with the value of the property on that day, and with interest on such value from that date.

Carr and Burnett were not only, not jointly liable with Hoppock, for that tort, but they in no way participated in it. The plaintiff could not have maintained an action against them, as being actors in, or parties to, that transaction. The release which the plaintiff gave to Carr and Burnett on the 31st of August, 1855, did not, by its general language, include that transaction. It certainly does not, in express terms, purport to release them from it, or from the damages caused by it.

I think, therefore, that as it not only does not appear that Carr and Burnett had any connection with the act constituting the plaintiff's present cause of action, but on the contrary, as it does appear, upon the facts as found, that all they did, was done to induce the sheriff to levy an execution in their favor on the property, and to sell under such levy, and that what they did do with that intent, was done after the complaint in this action was verified; the release given in evidence, does not affect the plaintiff's right to recover, and that the judgment should be affirmed.

JOHN T. WILLISTON v. WILLIAM B. JONES and HENRY VON
BAUER.

When it appears upon the face of a chattel mortgage that the mortgagor is to retain the possession and make sales of the goods mortgaged, the mortgage is absolutely void, and no question in relation to it is to be submitted to the jury upon a trial.) But where the mortgage contains no such provision, the fact that the mortgagor, for a time retained the possession, and during this period made sales, is not conclusive, but is one of those that are to be considered by the jury in determining the question of actual fraud.

A creditor who seeks to impeach a chattel mortgage upon the ground of the continuance in possession of the mortgagor, is bound to show that he was a creditor during the time that this possession continued.

Judgment for plaintiff upon a verdict in his favor.

(Before BOSWORTH and HOFFMAN, J.J.)

Feb. 11, 21, 1857.)

MOTION on the part of the plaintiff for judgment, upon a verdict taken subject to the opinion of the court at General Term.

The cause was tried before Woodruff, J., and a jury, in October, 1856.

The following is a statement of the pleadings and of the facts proved upon the trial.

The complaint set forth that the defendants, on the 8th of December, 1854, wrongfully took from the possession of the plaintiff, and carried away property to the value of \$237, consisting of starch, candles, and soap, as specified. It demands delivery of the goods and \$100 for damages for the detention, or that the defendants pay the full value, with interest.

The defendants unite in an answer, and deny generally the unlawful taking and the value.

The defendant Jones defended on the ground that, about the 7th of December, 1854, Van Bauer recovered in the Marine Court a judgment against Speilman and Kitz, for the sum of \$158,87: that, on the same day an execution was issued upon such judgment, and delivered to the defendant as a constable to execute; that by virtue thereof he seized the goods in question.

It appeared that a chattel mortgage was executed on the 24th of November, 1854, of the property in question to the plaintiff;

that it was given to secure various checks and notes; and that there was a debt due to the plaintiff at the time of giving the mortgage, and a large amount of notes not yet due.

It next appeared, that the plaintiff took possession of the property on the 2d of December, 1854; the former clerk of the mortgagors continued as the agent of the plaintiff, to sell the remaining stock of goods, and on account of the plaintiff. The delivery of possession, and the exercise of acts of ownership by the plaintiff from that date are amply proven.

The case was given to the jury under the charge of the court, and they found a verdict for the plaintiff against the defendant Jones. Such verdict was taken with liberty to make a case on the question, whether a non-suit or motion to dismiss the complaint should have been granted, with leave to the court to order a non-suit, if of opinion that it should have been granted, and to be heard at the General Term in the first instance. Entry of judgment was stayed until such hearing.

J. Palmer, for plaintiff.

E. S. Van Winkle, for defendant Jones.

BOSWORTH, J.—The complaint alleged that the defendants wrongfully and forcibly took the goods from the possession of the plaintiff; that they were worth \$237, and prayed judgment that they be restored; and for \$100 damages for the detention thereof. It stated a cause of action. The answer put these allegations at issue. Jones also alleged that he was a constable, and, as such, took them on an execution in favor of *Van Bauer v. Speilman & Kitz*, and from their possession, and that the goods were their property.

It was, of course, competent for the plaintiff to rebut any evidence which tended to show that the goods were the property of Speilman & Kitz, by proving, if he could, that they were not the property of either, but were his own property. Alleging that he was in possession of them when they were taken, was stating a fact which imported, *prima facie*, that they were his property. There was no error in admitting evidence to show them his property. The question of property was raised by the answer, and the Code put it at issue.

The mortgage was dated the 20th of November, 1854, and was filed on the same or the next day. The plaintiff demanded payment, and took possession on the 2d of December, 1854, and continued in possession, selling the goods on his own account, until the levy of the 7th of December, 1854.

The jury found for the plaintiff; and, of course, found that the mortgage was made in good faith, and without any intent to defraud the creditors of the mortgagors.

Unless the court erred in refusing to nonsuit the plaintiff, judgment should be entered on the verdict. Leave was given at the trial to the defendant Jones, "to make a case on the question, whether a nonsuit or motion to dismiss the complaint should have been granted, with leave to the court to order a nonsuit if of opinion that such nonsuit should have been granted, and to be heard at the General Term in the first instance." An exception had been taken to the refusal of the Judge to nonsuit. He might lawfully order that exception to be first heard at the General Term. He did so order; and that is the only question sent by his order to the General Term.

He was asked to nonsuit, on "the grounds that the mortgagors were shown to have trafficked in, or prosecuted business with, the mortgaged property, as their stock in trade, between the date of the mortgage and its forfeiture, when the plaintiff took possession, the 1st or 2d day of December, 1854, and that the mortgage was, therefore, void as against the judgment referred to in the answer, and the process issued to enforce it, and so void as against the defendants. The court overruled the motion; and to its decision in that behalf, the defendants' counsel then and there excepted.

I think the court was right in refusing to nonsuit, for several reasons.

1st. It was not then shown that Van Bauer was a creditor of the mortgagors.

2d. It did not appear that they had any creditors, either then or when the mortgage was given, except the mortgagee.

3d. If Van Bauer's judgment had then been proved, the case does not show for what it was recovered, and if for a demand against the mortgagors, that it existed before the mortgagee reduced the property to his possession.

All the evidence there is as to the mortgagors having trafficked

with the property was given by Johnson. He says, "after the mortgage was given, I remained there and conducted the business" until the 1st or 2d of December, when Williston demanded payment, took possession of the goods, and the key of the store. On cross-examination he said: "Between the 20th of November and 1st or 2d of December, 1854, the store was open, and the goods being sold out. I think I sold goods embraced in the mortgage between November 20th and December 1st or 2d; the goods were there for sale just as they were before the mortgage was given, and I would sell to all who would purchase; I sold goods, but don't recollect the amount of sales."

A jury, from this, and other evidence, might find that the sales were made with the knowledge and assent of the mortgagee, and the moneys used at the pleasure of the mortgagors.

If so, the mortgage would be void. But they might find that the sales were not anticipated by, or assented to, by the mortgagee, or if anticipated, that he expected the proceeds to be applied upon the debt secured by the mortgage. If so, I do not understand that the mortgage is necessarily, and, at all events, fraudulent.

(If it had been made to appear that, "upon the giving of the mortgage, the mortgagors were permitted, by the assent of the mortgagee, to continue to sell the goods by retail, at their discretion and for their own use," the mortgage would be fraudulent. (3 Kern. 583, 584.)) This was not so clearly proved that a jury might not have found to the contrary. The sales were during a very few days only. Actual knowledge that such sales were being made, and that, too, for the use of the mortgagors, was not directly proved. It does not appear from the case, that the mortgage authorized the mortgagors to continue in possession. I think, therefore, that when the nonsuit was moved, neither defendant was in a position to question the *bona fides* of the mortgage, and the motion was properly denied.

That, after proving the judgment and execution, the question of fraud was one for the jury, under proper instructions from the court. The instructions do not appear, and must be assumed to have been correct. The motion for a nonsuit was not renewed after Jones had proved the judgment and execution.

The plaintiff should have judgment on the verdict.

Williston v. Jones

HOFFMAN, J.—There is no exception to the charge, and it is to be assumed it left the law properly to the jury. The finding, then, negatives the supposition of fraud in the transaction.

What error of law has been in other respects committed?

1st. The defendants insisted that the complaint should have been dismissed, because the mortgagors prosecuted the business, and sold part of the goods from the date of the mortgage, November 24, to the date of the possession, the 2d of December; that this constituted absolute fraud in the law. The fact of such sales being made, and just as they were made before the mortgage, is fully proven. It is not expressly stated, but the inference may well be drawn, that the mortgagors received the avails.

That inference is not, however, a necessary one. A jury might, perhaps, have found the other way, that the sales were made in the expectation and under an agreement, that the proceeds should go to the mortgagee to reduce the debt.

It is the established rule in this court, adopted after considering the cases in the court of errors and Supreme Court upon that vexed question, that, in the case of mortgages, the retention of possession before the debt becomes due, and under a clause to that effect, is not of itself a proof of fraud. It is consistent with the import of the instrument. It is a question for the jury. (*Hull v. Carnley*, 2 Duer, 109.)

The same rule was recognized in *Swift v. Hart*, (12 Barb. 531,) which I refer to, because the same court decided it, and the case of *Edgell v. Hart*, next noticed.

In *Edgell v. Hart*, (13 Barb. 386,) the mortgage was of goods of a retail grocer, constituting his stock in trade. It was dated the 6th of August, 1849. Levies had been made under executions issued the 4th of October, 1849. Apparently, the judgments were of the 2d of October, but it was in evidence that the debt, at least to one of the plaintiffs in the judgment, was incurred in the spring of 1849. The mortgagee brought his action for the goods taken under the executions.

The mortgage contained the usual clause as to remaining in possession until default.

There was a schedule annexed to it, of the goods, and at the end of that was a clause declaring, "that if any of the goods were sold upon credit, that shall be sufficient cause of forfeiture,

and entitle said Edgell to treat the same accordingly at his election." A prior clause forbade the mortgagor expressly to sell any of the goods on credit.

The Judge at the trial denied a nonsuit, and left the question of fraud for the jury. After argument on a case at Special Term, judgment was entered for the plaintiff.

On appeal, the court held, that if the question had depended upon the mortgage alone, aside from the schedule, and the provision at its end, the nonsuit would have been properly refused.

But taking the two together, it was to be deduced, that the mortgagor was at liberty to sell the goods, provided he sold for ready pay, and not upon credit, and might sell upon credit if the mortgagee did not object to it. The transaction, then, as it appeared on the face of the papers, could not be sustained.

The court, (Justice Welles delivering the opinion,) cite and rely upon *Wood v. Lowry*, (17 Wend. 492,) and determine that *Hoe v. Archer*, (23 Wend. 653,) has not impaired the face of that authority.

The judgment was reversed, and a new trial ordered.

This decision was affirmed in the Court of Appeals. (Selden's Notes of Cases, December, 1853.) The note is very inaccurate as to the history of the case. But the judgment was affirmed, the court holding, that the mortgage was void, and that there was no question to be submitted to the jury respecting it.

We have not any other report of the case in the Court of Appeals, but in *Ford v. Williams*, (3 Kernan, 583,) Denio, Ch. J., says: "This court has decided that where, upon the giving of a chattel mortgage on the stock of goods in a store, the mortgagor is permitted, by the assent of the mortgagee, to continue to sell them by retail, at his discretion, for his own use, as he had done before, the mortgage is fraudulent and void as against the creditors of the mortgagor, *Edgell v. Hart*, December Term, 1853."

He then proceeds to state, that in the case then before the court, the Judge had charged, in effect, in accordance with that rule; but the case was distinguishable because there was testimony going to show that the mortgagor was to sell for cash, and apply the proceeds to the debt of the mortgagee, and that he did so apply them.

The differences between the present and the cases cited are

these. In *Edgell v. Hart*, the instrument itself proved the fraudulent intent. Evidence could not displace the conclusion from it. Here the continued selling was a fact, with others, for the jury to consider. In *Ford v. Williams*, the mortgagee had never taken possession. The execution found the property in the hands of the mortgagor. The continuance of possession was very long; in one of the cases, about a year; here it was only eight days. We have here, also, a verdict against the existence of fraud in fact.

Another important question arises in the case, Was the title of the plaintiff, to the goods seized, void as to those particular judgment creditors? If it was not, then the seizure by the constable was unwarranted.

They obtained judgment in the Marine Court, on the 7th of December, 1854. On the 2d of that month, the plaintiff had taken full possession under his mortgage. There is nothing in the case to show when the debt to Speilman & Kitz was incurred.

The 5th section of the act (2 Revised Statutes, 136) is the important one upon which these questions depend. It declares fraudulent transfers not accompanied with delivery of possession, etc., against the creditors of the party. By the 6th section, the term "creditors," as used in the section, "shall be construed to include all persons who shall be creditors of the vendor or assignor, at any time while such goods and chattels shall remain in his possession, or under his control."

Such was the case of *Fiedler v. Day*, (2 Sand. S. C. R., 594,) cited by counsel. The creditors' demand arose while the goods in question remained in the possession of the mortgagor.

The principle here is, that, continuing to uphold a fraudulent assignment is, as to subsequent creditors, precisely the same as creating it was to prior ones. The chief badge of fraud is the retention of possession, and a creditor who becomes such while this subsists, is equally defrauded, as if he were such at the date of the nominal transfer.

I once had occasion to consider the doctrine of the common law, prior to the statute of Elizabeth, (Chap. 13,) upon the subject of fraud in transfers of property. I examined in the Year Books all the cases collected in the cases of Fitzherbert and Brookes, which Mr. Reeves terms their substitutes. They could all be classed under the following heads:

1st. Where there had been a covenous alienation between judgment and execution. 2d. After action commenced, and before judgment. 3d. Before action, but in fraud of an existing right; and there was a subdivision under this head of cases arising under the Sanctuary Acts.

So the law was stated in *Sommes'* case, and in *Upton v. Bassett*, (Croke Eliz. 445,) that the common law only set aside conveyances fraudulent against him who had a former right, debt, or demand; but he who had a right more *puisne* could not avoid a gift or estate precedent, at the common law.

The rule in a Court of Chancery, to let in subsequent creditors in setting aside a conveyance through the instrumentality of prior creditors, or by reason of an existing indebtedness, is also a proof of this doctrine.

The case then appears to come to this. The assignment is found by the jury as not fraudulent in fact, at least, that is the legal import of the verdict. Upon the question of fraud in law, it may probably be distinguished from the cases in the Court of Appeals which have been cited, by reason of those assignments containing on their face the proof of fraud. Here the fact of sales was, like other facts, to go to the jury. But lastly, if the cases are not distinguishable, then the parties under whom the defendant justifies, do not appear to have been creditors when "the property was in the possession or under the control of the debtor."

It remains to be considered whether the defendants can be allowed now to produce the judgment record of the case in the Marine Court, which he offered on the hearing at General Term. It is proffered to show that the debt, in fact, existed before the 2d of December.

I do not see why a party who has had full time to make out his case, and has omitted it, without surprise, should be given this indulgence at the hearing on appeal. Their equities, as creditors, appear to be equal.

Judgment for plaintiff on the verdict.

JOHN BISSELL v. FREDERICK V. HAMBLIN and JAMES M. SLOAN.

An entry made by a public officer, in the discharge of his official duty, in a book which he is bound to keep as a record of his proceedings, is admissible in evidence to prove his performance of the acts to which it relates.

The evidence is admissible even when the officer is a party to the action, and it is on his own behalf that the proof is offered.

It is still a presumption of law that the entry was made by him in the proper discharge of his duty, and if mistake or fraud is alleged the proof lies upon the opposite party.

(Before BOSWORTH and HOFFMAN, J.J.)

Feb. 11; 21, 1857.

APPEAL, by plaintiff, from a judgment entered on the report of a referee.

The facts, and the single question of law arising thereon, are stated in the opinion of the court.

J. Bissell, appellant in person.

W. A. Coursen, for respondents.

BY THE COURT. HOFFMAN, J.—The plaintiff was regularly commissioned by the governor of Ohio, under the laws thereof, to act as commissioner in the state of New York, to take testimony, acknowledgments, etc.

He was employed by the defendants to take testimony in a case depending in one of the courts of Ohio, in which they were plaintiffs, and J. A. Harmon and George Knight were defendants. Having received the commission and instructions, he commenced, under one notice to the opposite parties, on the 8th of November, and adjourned to the 10th. Afterwards another notice, served in Ohio on the 23d of January, for the 31st, was laid before him. It was stated that Mr. Hamblin, one of the plaintiffs, was to be examined under it, but he was sick, and, until he recovered, the examination could not go on.

No particular directions were given to the plaintiff by the attorney leaving the notice. This notice, it is to be observed, was

served in Ohio upon the attorney there. It apprised him that the depositions would be taken from day to day before the commissioner in New York, until they were all completed.

The instructions provided, "that adjournments may be allowed if they are provided for in the notice, and there be a necessity therefor. If there be adjournments, they must be from day to day only, and the officer must note the fact, and also state the necessity therefor: this noticing shall be at the close of each day."

There is some indefinite evidence as to what the attorney of the present defendants communicated to the plaintiff, as to the cause standing over until the proposed witness got well. It is not sufficient to prove that such attorney relieved the plaintiff from the duty, otherwise incumbent upon him, of keeping the commission alive by regular adjournments.

A document was laid before the referee, marked exhibit E, and the question in the case is as to its admissibility. It purports to be a record, kept by the plaintiff, of his entries of the various adjournments of the cause, stating the necessity therefor, and noting each at the end of the day, according to the instructions. It is proven to be in the handwriting of the plaintiff. It is also proven that he had neither clerk nor partner, and there is some slight evidence from one who occupied the same office, that he occasionally saw a paper in or on the plaintiff's port-folio similar to this exhibit. That document closes with an entry of the 11th of March; that Mr. Hamblin (one of the plaintiffs in the suit in Ohio) told him that he (the plaintiff) had better discontinue the adjournments; that the claim had been assigned. Hamblin states that he may have told him that the claim had been assigned.

The sole question is, whether the record of the adjournments kept by the plaintiff is admissible as presumptive evidence of the adjournments?

The principle of the rule which admits official registers, entries, or books to be given in evidence, is, that they are made by authorized and accredited agents, appointed for that purpose. Those in question were made in the discharge of an official duty. The neglect of such an entry, if it had involved the loss of the cause, or the expense of a new commission, would have been a breach of his official obligation, as well as the neglect of his private agency for the parties. (Greenleaf on Evidence, § 483.)

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The distinction is of course obvious, that such official entries are admitted in evidence between third parties. Here it is offered to sustain the claim of the party making them.

But we have a familiar case of even private entries being allowed in shop-books, in the party's own writing. (Greenleaf, 117, etc.)

The cases cited by the plaintiff's counsel prove the general rule to be, that when a person is required to do a certain act, the omission of which would make him guilty of a neglect of duty, it ought to be intended that he has duly performed it, unless the contrary be proven. (19 John. Rep. 345; 4 Wendell, 623; 10 East. 216.)

We have, in this case, a public officer appointed under the law of a state. He was employed to act in his official capacity by the defendants. In fulfilling his duties to them, he was bound to make the entries of his adjournments. The only existing mode of proving these entries is his record. There is nothing to cast a suspicion upon their integrity. There is a little corroborative evidence to support them.

We are of opinion that the exhibit ought to have been received in evidence by the referee.

Judgment reversed, the referee's report set aside, and a new trial ordered, with costs to abide the event, unless the parties consent to an order that the cause be sent back to the referee, upon the proofs already taken, to the end that he may find in conformity with the judgment of the court; in which case the costs of the appeal are to abide the event.

GRAHAM, and others v. MACHADO, and others.

In an action against the drawer of a bill of exchange, payable a certain number of days after sight, an averment, in the complaint, that the drawee accepted the bill, is equivalent to an averment that the bill was presented to him for acceptance, and that he had sight thereof when he accepted it. But an averment in the complaint, that the bill was "duly presented for payment," and "payment duly demanded," is not sufficient, within the rules of pleading established by the Code. The allegation that a bill was presented for payment, and payment demanded, is an allegation of facts; but whether these acts were so performed as to render them valid and binding is a question of law, to be deter-

mined by the court, and which cannot be withdrawn from its decision by the averment that they were "duly performed."

To enable the court to determine the question, the facts from which the conclusion of law is to be drawn, and which the plaintiff will be bound to prove upon the trial, must be distinctly alleged in the complaint. The allegation that the bill was duly presented for payment, and payment "duly demanded," omits material facts, the evidence of which the court has no right to imply; namely, that the bill was presented to the drawer, and payment demanded from him.

So, where facts are relied on as sufficient, in law, to excuse such a personal presentment and demand, they should be set forth in the complaint, to enable the court to judge of the sufficiency of the excuse.

The allegations that a presentment was "duly made," and payment "duly demanded," are not warranted by the provisions in § 162 of the Code, which declares that in pleading the performance of certain acts as conditions precedent, a general averment, in the complaint, that all these acts were duly performed, on the part of the person so pleading, shall be deemed sufficient. In the opinion of this court § 162 has no application to averments in a complaint necessary to charge the drawer of a bill of exchange; but is applicable only to conditions precedent expressed in a contract, and which, by its terms, are to be performed by a party to the contract, who is also a party to the action, and the performance of each of which conditions by himself, but for this section he would have been required to state in his complaint or answer.

Although presentment of a bill of exchange to the drawer, a proper demand of payment, and its refusal, and timely notice of such demand and refusal are conditions precedent to the liability of the drawer, yet they are not conditions to be performed by him, nor expressed in the contract to which he is a party, and therefore, are not conditions of the character of those to which § 162, by its very terms, alone refers. When it is sought to charge the drawer of the bill, an allegation in the complaint that it was duly protested for non-payment, is not equivalent to averments that it was presented for payment to the acceptor, and that payment was demanded from, and refused by him.

Although, in a notice given by a notary to the indorser of a promissory note, or the acceptor of a bill of exchange, a statement that the note or bill, at its maturity, was protested for non-payment, is deemed a sufficient notice of a demand and refusal of payment, the assertion that the same words, as an averment in a pleading, must receive the same construction, rests upon no principle, and upon no sufficient authority.

It is an error to suppose that any such rule of construction was laid down, expressly or impliedly, as a rule of pleading, by the Court of Appeals, in *Coddington v. Davis*, (1 Comstock, 182.)

It was upon the grounds above stated that the court placed its decision, in which all the Judges concurred; but it was also held, by Woodruff, J., that the complaint was fatally defective in not stating at what time the bill in suit was presented to the drawer, nor when he had sight thereof, nor when he accepted it.

He held that the want of these averments, admitting the truth of all the allegations in the complaint, rendered it impossible for the court to say that payment of the bill was demanded, or refused, on the day when, by law, such payment was demandable.

Order at Special Term, overruling demurrer to the complaint, reversed, and judg-

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ment upon the demurrer for the defendants, with the usual liberty to the plaintiffs to amend their complaint.

(Before all the Judges.)

February Term, 1857.

APPEAL from order of Special Term overruling demurrer to complaint.

The nature of the action, the terms of the complaint, and the questions of law raised by the demurrer, are fully stated in the opinion of the court.

E. C. Benedict, for appellants, defendants.

H. Whittaker, for respondents, plaintiffs.

BY THE COURT. WOODRUFF, J.—The complaint, so far as it is material to state its contents, shows title in the plaintiffs as indorsees of a certain bill of exchange drawn by the defendants at the city of New York, on the 17th day of May, 1856, directed to John E. Martin at Lisbon, Portugal, payable sixty days after sight thereof, and then avers, "that the said bill of exchange was duly accepted by the said John E. Martin, and became payable by virtue of such acceptance at Lisbon aforesaid, on the 13th day of August now last past. That on the said 13th day of August last, the same bill of exchange was duly presented for payment, and the payment of the money therein named duly demanded at Lisbon aforesaid, but the same was not paid; whereupon, and on the said 13th day of August now last past, the same was duly protested for non-payment," and notice to the defendants, etc., etc.

To this complaint the defendants demur on the general ground that the complaint does not state facts sufficient to constitute a cause of action, and assigning special grounds, that it does not allege, that the bill was presented to Martin, the drawee, for acceptance; nor when, if ever it was so presented; nor when he had sight thereof; nor when he accepted it; nor to whom it was presented for payment.

The averment that the drawee accepted the bill, sufficiently embraces, if it does not necessarily involve the fact that it was presented to him, and that he had sight thereof. If this action was founded upon a refusal of the drawee to accept, then the proper

averment would be, that the bill was presented to the drawee for acceptance, and that he refused; but where the ground of claim upon the drawers is the non-payment of a bill payable after sight, the averment of acceptance is made for the purpose of showing when the bill became due, or more accurately perhaps, to show that the demand of payment and refusal were at the right time to put the drawers in default. The bill being accepted, the acceptance as between the holders and drawers, serves no other purpose. The precedents to be found in Chitty do not in such a case contain an averment that the bill was presented for acceptance, and so far as the objection here made goes to the mere failure of the plaintiffs to aver such a presentment, or to aver that the drawee had sight of the bill, the acceptance implies that when the drawee accepted, the bill was before him for that purpose, and that he then had sight thereof.

The averment in the complaint that the bill "was duly presented for payment," and payment "duly demanded," is not within the rules heretofore prescribing the mode of declaring in such a case. Alleging a presentment and demand of payment is alleging facts, but whether they were duly made and done, if "duly" has any clear legal signification, is a question of law to be determined by the court upon all the facts which may be proved, and a most material fact is not here alleged, viz.: that it was presented to the drawee and payment demanded of him; or if there exist facts which excused such a presentment to him, then those facts are wanting.

But we are referred to the provisions of section 162 of the Code, which it is insisted render it unnecessary for the plaintiff to state to whom the bill was presented for payment. That section provides that "in pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally, that the party duly performed all the conditions on his part;" and Mr. Justice Gridley, in *Gay v. Paine*, (5 How. Pr. R. 107,) applied this section to a complaint in this particular very much like the present, and held, that where a note was payable at a particular place, an averment that the note was duly presented to the maker, and payment duly demanded was a sufficient averment that the note was also presented at the place at which it was payable.

Graham v. Machado.

The court are of opinion that section 162 of the Code, in what is there contained relating to averring the performance of conditions precedent, has no application to averments necessary to charge the drawer of a bill of exchange. They deem this section applicable to conditions expressed in a contract which, by the terms thereof, are to be performed "on his part," i. e., by the party thereto, and which, but for this section, he must state to have been performed by him in detail. And that the object of the legislature was to avoid prolixity in pleading, by permitting him to aver generally, (by grouping all the conditions to be performed by himself), that he had duly performed them all. The section substitutes a general averment of performance for a statement in detail of the performance of each distinct act which the party was bound to perform. Its purpose was not to give to the word "duly," when applied to a single, specific averment, any such comprehensive force and meaning as is claimed for it in this case, and make the use of that word by the pleader tantamount to an averment of every other fact necessary to make the presentment, which is averred, a legal presentment. It is obvious that if the provisions of section 162, relied upon by the plaintiffs, are applicable to pleadings on bills of exchange, it must go to the length of warranting, (after a statement of the drawing of the bill, and the plaintiffs' title thereto), a general statement that every thing was thereafter done which the law requires to charge the drawer with its payment, or that all the conditions, upon which the duty of the drawer to pay the bill to the plaintiffs arises, have been performed or have happened. The court are of opinion that, although the undertaking of the drawer of a bill of exchange is, that it shall be accepted and paid, and that if it be presented in due season, and acceptance or payment is refused, and he be notified, he will pay the same, which latter are treated, as in truth they are, conditions of his liability, yet they are not of the class referred to in the section cited.

It is pertinent to observe in regard to this subject, that if the legislature have provided a substitute for the former special and detailed mode of averring the performance of conditions, the pleader can only claim the benefit of the privilege given him when he adopts the substitute. If, instead of availing himself of the liberality extended to him in contravention of all pre-existing

rules, he assumes to state what has been done and performed, he should so state the fact or facts, that the court may see that they do, in truth, amount to performance. The legislature, by providing a substitute for the former mode of declaring, have not sanctioned a complaint clearly bad under the pre-existing law, and not warranted by the new. And, therefore, in the present case, if the pleader undertook to state specifically a presentment for payment and refusal as the ground of his claim upon the defendant, he should so state the facts that the court can see upon the face of the complaint that it was a legal presentment.

We are also referred to the case of *Woodbury v. Sachrider*, (2 Abbot Pr. Rep. 402,) and upon the authority of that case the plaintiff insists that the averment in the present complaint, that the bill of exchange in question was, on the said 13th of August, duly protested for non-payment, obviates the objection above considered, because the protest of a bill, *ex vi termini*, imports presentment to the maker, demand of payment, and refusal thereof. With great respect for the learned Judges by whom the case referred to was decided, we feel constrained to say, that the authority upon which that decision was distinctly placed, does not, in our judgment, warrant any such construction of the term protest in a pleading, and that it cannot be supported by any sufficient authority or established principle. The case of *Coddington v. Davis*, (1 Comstock, 183,) was supposed to warrant the construction now contended for. That was an action upon a promissory note against an indorser who had made a written request of the holders "not to protest" the note, and a declaration that he would "waive the necessity of the protest thereof;" the court held this to be, according to its fair interpretation, a waiver of demand and notice of non-payment. Obviously, if this case proves any thing applicable to a complaint on a bill of exchange, and furnishes a rule of pleading, it dispenses with an averment of notice of non-payment. This is so wide a departure from the rules of pleading recognizing the necessity of that averment for centuries past, that I doubt whether the court would, even in *Woodbury v. Sachrider*, have so ruled. A distinct averment of notice, upon which issue could be taken, never has been held, and we apprehend will not be held embraced in an allegation that the bill of exchange was duly protested. In no sense is it so included. By no general rule of commercial law

is the giving of notice of protest or of non-payment a necessary part of the duty of the notary called upon to protest the bill.

But, in truth, the decision in *Coddington v. Davis* gave no rule of pleading whatever; the question there was a question of evidence merely. The action was on a promissory note. Protest of such a note was not necessary. The court say that the term protest, in its strict, technical sense, i. e., the formal memorandum of the notary making his official declaration of protest, has no proper application to a note, and that the term protest, as applied to such notes, has a popular meaning, in which, as matter of evidence, the defendant must be taken to have used the term. That he must be deemed, according to the reasonable interpretation of his letter, to have intended to dispense with something which it was otherwise necessary for the holders of the note to do, and that, "in a case like that," he must have intended to waive those acts which, among merchants and bankers, were included in the popular sense in which the word protest was used. The Court of Appeals certainly did not decide, that averring protest in pleading included an averment of notice of non-payment; nor did they, we think, intend so to decide, or by any implication sanction such a decision, and no more did they, that in pleading, averment of protest, includes an averment of demand of payment from the drawer. The protest of a foreign bill of exchange is a necessary official act, without which the drawer cannot be charged; it is based upon a demand of payment from the acceptor; no matter how formally done, the act of protest is wholly insufficient without a demand. Neither books of precedents nor adjudged cases have heretofore furnished any warrant for dispensing with the allegation of both in declaring upon a foreign bill, and we are not prepared to hold, that the averment of protest in the present complaint cures the defect in the allegation of demand and refusal above considered.

The court are to be understood to place the decision of the present appeal upon the grounds above stated. But as it may be useful, in the further conduct of the cause, if the plaintiffs should think proper to amend, I add some suggestions arising in my own mind on a consideration of the other and remaining objection to the complaint, which is, that the complaint does not state at what time the bill was presented to the drawee, nor when he had sight thereof, nor when he accepted it.

That the time when the bill was presented for acceptance, which is, in substance, the same thing as the time when he "had sight thereof," and the time when the acceptance took place, are both material, cannot be denied. (*Holmes v. Kerrison*, 1 Taunt. 323; Chitty on Bills, *passim*.)

A bill may not be accepted when presented for that purpose, and may afterwards be accepted. The present being a bill payable after sight, the presentment for acceptance was necessary, and it is material to the liability of the drawee that the acceptance took place at the time when the bill was so presented, otherwise the drawee was not charged and is not liable. The precedents in Chitty cover this point by averring that the drawee, "upon sight thereof, accepted," etc. The complaint, stating neither presentment nor sight of the bill, simply says that the drawee "duly accepted." Such an averment is fully satisfied if the acceptor so accepted as to charge himself with the payment, whensoever his acceptance. It is not easy to see the propriety of giving to the word duly, in this connection, an effect tantamount to an allegation that the drawee accepted upon sight of the bill. But if this could be done, it still remains wholly uncertain when; that is, at what time the acceptance was made, and, therefore, wholly uncertain when the sixty days (which the bill had to run after sight) began to elapse, and when the bill became due; and upon this depends the sufficiency of the subsequent demand and refusal to charge the defendants.

It is true that the pleader has averred that by virtue of such acceptance the bill became payable at Lisbon on the 13th day of August. By this he must mean one of two things: *First*, that the drawee, by the terms of his acceptance, specially appointed Lisbon as the place, and the 13th day of August as the day for payment; in which case it in nowise appears that the terms of the bill were in this respect pursued, and if not, then clearly the drawee is not liable. Or, *Second*, he means to say that the legal effect of the acceptance was to make the bill payable at Lisbon on the 13th day of August.

Whether this is true or not, depends upon the time when the acceptance was made. We cannot see, from the facts alleged, whether the proposition of the pleader is true or not. When a bill or note is payable, is a question of law, depending sometimes

wholly upon its terms, and sometimes upon its terms and other extrinsic facts. Here it depends upon the bill itself and the day on which it was presented for acceptance, and of that day this complaint says nothing. And, it may be further added, that the inquiry whether any and what number of days of grace were allowed, and whether these conformed to the usage and custom of the foreign country where the bill was payable, may also be material.

It is true that if we were to assume that the pleader has judged correctly of the legal construction of the bill, in connection with the day of its presentation, and that his inference that the bill became payable on the 13th of August is correct, we might go back from the 13th of August and, assuming that the usage and custom of the place of payment was, in respect to days of grace, the same as our own, by computation find on what day the bill was presented for acceptance. But this is reversing the course and office of pleading; it is asserting a legal proposition, and calling upon the court to assume its truth and infer every fact which must exist in order to sustain it. The pleading should state the facts, and whether the bill became payable on the 13th day of August or not will then appear, whether averred or not.

If the pleader may omit to state the day of presentment for acceptance, why may he not, after describing the bill, pass at once to the statement that such bill became payable at Lisbon on the 13th day of August? The argument in support of such a pleading would be the same as is now submitted, viz.: assuming the truth to be that the bill became payable on the day named, the court can, and must infer the facts, to wit: that the bill was presented to the drawee, sixty days and the proper allowance for grace before that day, and was by him accepted at that time.

No construction of the 162d section of the Code will warrant such a reversal of the office of pleading.

When a bill is, by its own tenor, payable on a particular day, an averment that it was presented on the day upon which it became payable, according to the tenor thereof, has been held sufficient. (*Bynner v. Russell*, 1 Bing. 23.) Here no extrinsic fact was necessary to enable the court to say on what day it did become payable.

The order at Special Term overruling the demurrer must be

reversed, and judgment thereon ordered for the defendants, but with leave to the plaintiffs to amend their complaint within twenty days on payment of costs of the demurrer and proceedings at Special Term thereon. Costs of the appeal \$10, will abide the event of the suit.*

PAGE v. THE NEW YORK CENTRAL RAILROAD COMPANY.

When a railroad company gives such published notice of the running of its trains, and such special notice in the cars of the necessity of changing cars, at any particular station, that every traveller of ordinary intelligence, by the use of reasonable care and caution, would obtain all requisite information as to the route to be travelled, and the cars to be taken at such intermediate point of the voyage, it discharges its whole duty in this respect.

If a passenger, merely by a failure of his own to use such care and caution, instead of changing cars at a particular station, and there taking cars which go to the place to which he has paid his fare, continues in the cars in which he started, and is carried in another direction, the result is to be attributed to his own negligence, and not to a breach of duty or of contract on the part of the company.

If by inadvertence he is started from a station at which he should have changed cars, in a wrong direction, and this is discovered in time to enable him to return to such station, so that he may go thence for the place to which he had bought a ticket, without any delay, and if he is permitted to return without charge, but refuses to do so, or to pay his fare for the route he is actually travelling, or to leave the cars, he may lawfully be ejected therefrom. If ejected, his own declarations made some days thereafter, that he was injured thereby, are not competent evidence in his own favor to prove the fact of such injury.

Before OAKLEY, CH. J., BOSWORTH and HOFFMAN, J.J.)

Argued, Feb., 1857 ; decided, March 28, 1857.

THIS action comes before the court on questions of law arising at the trial, being exceptions taken by the defendants to the

* To the reasons stated in this opinion for holding a complaint to be bad which merely avers that a foreign bill was "duly protested"—if the averment must be construed to refer to our own law—it may be added, that unless the bill is drawn upon England, the court has no right to presume that the law of the foreign country upon which it is drawn is similar to our own. Upon the continent of Europe there is a great variance in the laws that regulate the demand of payment, and the time and form of a protest, and hence, unless the bill is drawn upon England, it would seem, that to enable the court to judge of the truth of the averment, the law of the foreign country where the bill is payable should be set forth in the complaint.

charge of the Judge. It was tried before Chief-Justice Oakley and a jury, in November, 1856, when the plaintiff recovered a verdict for \$175.

The action is brought against the defendants as common carriers, to recover damages for an alleged grievance in carrying him over the wrong road, and wrongfully and forcibly ejecting him from the cars.

The plaintiff, on the 8th of October, 1855, bought of the defendants, at Albany, a ticket from that place to Lyons, before six A. M. He took a train which left Albany at half-past six, A. M., and which from Syracuse passed over the old road, so called, through Marcellus, Auburn, Waterloo, and Vienna to Rochester. A second train left Albany at half-past seven, A. M., and from Syracuse passed over the new road, so called, through Lyons to Rochester. The ticket was good in either train to Syracuse. The principal questions of fact litigated, were: *First*, Whether the plaintiff, on reaching Syracuse, had notice, or might have known, if he had paid proper attention to the means used to give him notice, that he must leave the cars he was in, at Syracuse, and wait the arrival of the next train? *Second*, Whether, after leaving Syracuse and before reaching Marcellus, he was told he was on the wrong road, and must take, at Marcellus, the train he would meet there going to Syracuse, and which would carry him there in time to meet the half-past seven, A. M., train from Albany to Lyons? *Third*, Whether, notwithstanding such knowledge and information, and after a demand of fare on the old road from Syracuse, if he persisted in continuing on that route, he refused to leave the cars or pay fare, and was for that cause ejected from the cars at Vienna, without more force being used than was necessary for the purpose? On all these points there was a great conflict of evidence. During the progress of the trial,

George T. Dickinson was called as a witness on the part of the plaintiff, and testified as follows, to wit:

"I am a fruit dealer; know plaintiff; am his partner; the firm is A. W. Page and Company, 146 West street, in this city. I remember the fact of his going west last October a year ago. He started for Lyons to purchase fruits; was well when he left; gone four or five days." Plaintiff's counsel here asked witness the following question, to wit: "Was he well when he came back?"

To this defendants' counsel objected as incompetent, as nothing had been shown making defendants responsible for plaintiff's health or physical condition on his return, which objection the court overruled, and defendants' counsel excepted. The witness proceeded as follows, to wit: "He complained very much of his back; he complains of his back still at times; when he takes cold he is affected very materially; it has interfered with his business."

So much of the charge as is essential to a more perfect statement of the case, and to present the portions of it which were excepted to, was as follows:—

"On the arrival of the train at Syracuse, it is their habit to stop or go slowly before reaching the depot, and the conductor there gives notice to passengers going to Lyons that they must change at Syracuse, and take the cars going by the new road. Mr. Rippy, a witness, says he heard no such notice, but only that twenty minutes would be given for dinner. That is an extraordinary feature in his evidence, gentlemen, because it has been shown that that train never stops there to dine. There is something about that which would require explanation. Mr. Rippy tells us that on arriving at the depot, Mr. Page, (the plaintiff,) left the cars for some ten or fifteen minutes. If he did leave, Mr. Rippy must be mistaken as to the time, because that train starts in five minutes. The cars went on the old road. Mr. Rippy says the tickets were examined, but that nothing was said by the conductor until on the examination after they had passed Marcellus, and then the conductor spoke to the plaintiff about being on the wrong road; and Mr. Page then said, 'You are in fault—you must send me back to Syracuse, and give me a passage there;' and he goes on to say that the conductor refused to give him a passage back. The matter continued on in that way until they arrived at Vienna, where the conductor undertook to remove the plaintiff from the cars. He (the conductor) came into the cars, Mr. Rippy says, with those two brakemen; nothing was said at all; but the conductor pointed out Mr. Page, and he was immediately seized, and removed or put out of the cars. If that is so, gentlemen, then beyond all question the plaintiff has a right to recover, because it was clearly the duty of this company to offer to send this man back to Syracuse, to reach Lyons as he could have done in time,

by meeting the train for the new road. If they did not offer to do it, they were clearly in the wrong; and as long as they chose to keep him in the cars, and not send him back, they had no right to remove him. If Mr. Rippy's statement be correct, he evidently wanted to go to Lyons, and not to Rochester. If that is the truth of the matter, then the plaintiff had a right to recover.

"On the other hand, the defendants say that notice was given at Syracuse, as usual, for passengers to Lyons to change cars; and the brakeman, Richards, swears that upon that day, the 8th of October, when about to leave Syracuse, to go on the old road, notice was given to all persons going to Lyons to change; and he fixed that fact, and the date, by saying, that soon after his attention was called by the conductor to note it. If his attention was called to it, he would easily remember that he had not neglected to do so at that time.

"Here commences the discrepancy between the two parties. Notice might have been given, and Mr. Page or Mr. Rippy not have heard it; but the conductor states, that upon examining the ticket, before arriving at Marcellus, he found this man was on the wrong road; that he told him so, and that he should get out at Marcellus, and return to Syracuse, which he could do without additional pay, and arrive in time to meet the seven and a half, A. M., train to Lyons. The conductor says that, afterwards, when he got to Auburn, the plaintiff had not left, and he asked him why he had not; finding, further on, that he did not leave, he gave him to understand that he could not go on the road further than a distance equal to that from Syracuse to Lyons; at Vienna he told the plaintiff that he would take him to Rochester for the additional fare; this Mr. Page did not pay, nor offer to pay; in that stage of the case, when they arrived at Vienna, the conductor says he called in the brakemen; that he then told Mr. Page he should pay the additional fare or leave the car, and that he refused either to pay or to leave. That story they all three swear to, and that is in contradiction to the story told by Mr. Rippy. There is the painful part of the case, where you have to discover who tells the truth. Then, as the brakemen say, the plaintiff having refused to leave or pay the fare, they were ordered to take him out, and they did so, he making some slight resistance, and they using no further violence than was necessary. If that be true, then the

plaintiff has no right to recover, because his conduct would be contrary to all reason, in not leaving at Marcellus. If the truth is as the conductor and brakemen state, then Mr. Page is undoubtedly in the wrong; and if he refused to get out at Marcellus, when told that he could return to Syracuse, and meet the train going to Lyons, and insisted in remaining in the car going to Rochester, it would be a presumption that he wanted to go to Rochester without paying his fare.

It all turns, gentlemen, on the question as to who tells the truth. That you must decide yourselves, on the view you take of the evidence and all the surrounding circumstances, you must settle the matter according to your consciences, in the best way you can. If you come to the conclusion, that the story of the conductor and brakemen is true, in contradiction of Mr. Rippy's statement of what occurred at Vienna, then Mr. Rippy would not be entitled to credit in any thing. If, on the contrary, you come to the conclusion that Mr. Rippy tells the truth as to what took place in the car, then there can be no doubt as to the truth of the other circumstances he narrates. If you place confidence in the statements made by Mr. Rippy, then the plaintiff is entitled to recover. If, on the contrary, you believe the conductor in his story, then your verdict must be for the defendants.

On the question of damages, if you come to that, the same difficulty arises; for if you believe Mr. Rippy in contradiction of the brakemen as to what occurred in the car, then you cannot believe their statement in any particular, when they say Mr. Page did not complain of injury. We have, on this point, no evidence that the plaintiff did complain until he returned to this city. His partner and Captain Shaw say he then complained, and I believe they add that he still continues to complain. The doctor states he attended upon him, and cured him in May or June; but he probably may be disposed to speak with more certainty of that than others may think justified. The question was raised whether evidence as to the plaintiff's complaints was competent to be laid before the jury, and I allowed it; but it by no means follows that you are to take those complaints as certain evidence of the extent to which Mr. Page suffered. If that were so, every man might make up his own damages, by making his own complaints. The usual course, where it is claimed that injury has been sus-

tained, is to call a physician who can tell the nature of the injury in order that the jury may rest upon some safe grounds as to what the extent of that injury is. That would be the natural course. No physician has been called, however, and the matter is left, consequently, in a very uncertain position. If you come to estimate damages, then you will consider all the circumstances, and make due allowance for what the plaintiff has omitted to prove.

The counsel for the plaintiff then asked the court to charge the jury as follows, to wit: "That even if the agents of the company were authorized to eject the plaintiff from the car, yet, if in doing so, they used more violence than was necessary, the defendants were responsible for damages."

The court so charged.

The counsel for the defendants then asked the court to charge the jury: "That if they believed that notice was given to the passengers who held tickets, for the new road at Syracuse, as testified by defendants' witnesses, then the plaintiff passed on to the old road through his own default, and the defendants were under no obligation to carry him on without his fare, or to return him to Syracuse."

The court refused so to charge, unless the plaintiff was shown to have heard the notice. Defendants' counsel excepted to this refusal.

The jury found a verdict for the plaintiff of \$175.

John Graham, for the plaintiff.

John H. Reynolds, for the defendants.

BY THE COURT. HOFFMAN, J.—The inaccuracy with which, as we apprehend, the charge of the Judge at the trial is presented to us, renders a new trial necessary. The Judge is stated to have said, that notice might have been given, and yet Mr. Page or Mr. Rippey not have heard it; and subsequently was requested to charge "that if they believed that notice was given to the passengers who held tickets for the new road at Syracuse, as testified by the defendants' witnesses, then the plaintiff passed on the old road through his own default, and the defendants were under no obligation to carry him on without his fare, or to return him to Syracuse."

The court refused so to charge, unless the plaintiff was shown to have heard the notice.

That the learned Judge meant to qualify this proposition by the idea that it would be sufficient if the plaintiff was in a position to hear such notice, we do not doubt. But as the charge is presented upon the case, the jury would have been misled, and the influence of the error in favor of the plaintiff is apparent.

We proceed, with a view to the new trial, to state our opinion upon the leading points argued by counsel, or arising in the cause.

It may be admitted, that the question is settled, in our state, that a restriction of a common carrier's liability for goods is not to be effected by a general public notice, although it may be by special contract. (*Parsons v. Monteath*, 13 Barbour, 353; *Moore v. Evans*, 14 Barb. 524. See, also, *The N. Y. S. Co. v. The Merchants' Bank*, 6 Howard's U. S. R. 382; *Davis v. The New Jersey Ins. Co.*, 4 Sandf. Rep. 136.)

But the case of passengers is very different from that of goods. The counsel of the defendants very justly argues, that the passenger owes a correlative duty to the company, which he is bound to observe. They are to take care of him, but he is also, in many respects, to take care of himself; and a wilful or a heedless neglect of reasonable regulations actually, or by a strong inference, made known to him, exempts them from any liability for the consequences.

If the plaintiff had travelled the road before, in the train leaving at the same hour, it would be a fact bearing upon the question of knowledge. The weight of that fact would depend upon the frequency and recency of the period of such travelling.

If the defendant gave such published notice of the running of its trains, and such special notice in the cars, of the necessity of changing cars at any particular station, that every traveller of ordinary intelligence, by the use of reasonable care and caution, would obtain all the requisite information as to the route to be travelled, and the cars to be taken at any intermediate point of the voyage, it discharges its whole duty in this respect.

If a passenger, merely by a failure of his own to use such care and caution, instead of changing cars at a particular station, and taking cars which go to the place to which he has paid his fare, continues in the cars in which he started, and is carried in another

direction, the result is to be attributed to his own negligence, and not to a breach of duty, or of contract, on the part of the company.

The fact of the publicity of such regulations, the time, manner, and circumstances of publishing them, and whether sufficient to bring home actual notice to the passenger, provided he bestows reasonable care and attention, in order to inform himself, is one to be determined by a jury.

Merely pointing the plaintiff, at Albany, to this train of cars, as the one to be taken, is not an engagement that such train would carry him to Lyons, without a change of cars, in the progress of the route.

Being directed to that train at Albany, as one in which he was to take a seat, would not give him a right, on reaching Syracuse, and being expressly told that he must there leave that train and wait the arrival of, and take a seat in the next train, in order to go to Lyons, to insist on being conveyed to Lyons in the train in which he started from Albany.

Hence, the question necessarily resolves itself into one of fact, and that is, did the company use such means, to give information before reaching Syracuse, of the cars to be taken at that place, in order to be carried to Lyons, that the exercise of reasonable care, attention, and caution, on the part of the passengers, would have brought that information to their notice?

If it did, it was the fault and negligence of the passenger, and not of the company, that the passenger to Lyons continued ignorant of the necessity of leaving the cars at Syracuse, and waiting there until the arrival of the next train. For the consequences of such negligence the company is not responsible.

If passengers for Lyons were not allowed to go as far as Syracuse in the train first leaving Albany, but, on the contrary, were required to start from Albany in the train which left last, those of them who might find it convenient to stop an hour at some intermediate point, would be very apt to complain of such a regulation, as being unnecessarily oppressive and unreasonable. A regulation which promotes the convenience of some passengers, and interferes in no way with that of others, should be regarded favorably, and, if every reasonable precaution is used to bring to all passengers the knowledge of it, the company should not be held

responsible for the consequences resulting from the inattention of passengers, and their neglect of the means used to convey to them such information.

So, if the plaintiff was told, before reaching Marcellus that he must stop there, and return to Syracuse in a train he would meet at Marcellus, and that he might return in it without charge, it was his duty to have returned, if by doing so, he would have reached Syracuse in ample time to take the train for Lyons. If he refused to do that he should not be held to have any right to continue further on the train in which he was riding.

If the plaintiff left Syracuse on the wrong train through his own neglect to attend to proper information given, that it was necessary for passengers for Lyons to wait at Syracuse for the next train, or was in fault in not leaving the cars at Marcellus, and, notwithstanding that, insisted on going further, the agents of the company had a right to put him out of the cars if he refused to leave them on being requested so to do.

The company, in such event, would not be liable for ejecting him from the cars, unless more force was exerted than was necessary for the purpose. If more was used, then it would be liable for any injuries produced, or damage caused, by such excess of force. (Angell on Carriers, § 527 a, and § 531, note 1.)

The plaintiff had not proved enough to make his own statements or complaint that he had a lame back admissible. No physical injury, caused by ejecting him from the car, had been proved which justified the inference that a lame back was the consequence of it. It is difficult to say why his complaints of pain or soreness in any other part of his system would not be equally competent.

There should be some proof of actual injury other than complaints of the party himself, made several days subsequently, to justify the admission of such complaints. If those who witnessed the transaction give no evidence justifying the inference of actual injury, nor of any complaints of injury made at the time of the transaction, the mere fact that several days subsequently he complained of lameness in his back, without proof where he had been, or what he had been doing in the mean time, is no evidence that such lameness was caused by ejecting him from the cars. It does not amount to as much as an explicit declaration of his own, that

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he was injured by being ejected from the cars. Such a declaration would be clearly inadmissible.

This case is very different from that of *Caldwell v. Murphy* (1 Kern. 419).

In that case, it was proved by a physician that the plaintiff was injured internally. The witness under examination had taken care of the plaintiff from the time he was injured for about ten or eleven days; had assisted him in getting from his bed, and in getting down stairs, and had seen him repeatedly since. He was asked as to the condition of the plaintiff's health since the accident, and answered, "he has invariably complained."

There was sufficient foundation laid for such evidence. But the evidence given in this case reverses the rule, and if of any effect, tends to prove an injury from the mere fact of complaints at a subsequent period, without any evidence of injury or complaint at the time of the transaction in question.

A new trial must be granted, with costs to abide the event.

COBURN, appellant v. BAKER and wife, and GRIDLEY, receiver of WILLETT, respondents and defendants.

When two persons exchange notes, each taking the note of the other, of the same date and amount, and payable at the same time, each note is the proper debt of the maker thereof, and each of such persons is a purchaser for value of the note he received from the other in exchange for his own.

Hence, if Willett (one of the two) transfers the note he so received to another, as collateral security for the payment of a mortgage on premises which Willett had bought subject to such mortgage, and on an agreement to pay such mortgage as a part of the contract price; and if Coburn (the other of the two) and the maker of the note so transferred, pay it, Coburn cannot maintain an action against Baker and wife, by reason of the same premises having been conveyed to Baker's wife before the note made by Coburn became due or was paid, subject to the same mortgage, and on her agreement to pay such mortgage as a part of the purchase money, to obtain a judgment compelling Baker and wife to refund to him the amount of such note, or that, in default thereof, the mortgaged premises be sold, and the proceeds of such sale be applied to reimburse to him the amount of such note, although Willett has failed to pay the note he gave to Coburn, and has become insolvent, and a receiver of his property has been appointed on proceedings supplementary to execution.

Such a receiver, he having been appointed before the notes so exchanged were due,

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could have enforced payment of the note made by Coburn, had it then belonged to, and been held by Willett, and the proceeds would, of right, be payable to the judgment creditors, at whose suit such receiver was appointed. Judgment, dismissing the complaint, affirmed.

Before OAKLEY, CH. J., BOSWORTH and HOFFMAN, J.J.)

Argued, February 15; decided, March 20, 1857.

THIS action comes before the court upon an appeal by the plaintiff from a judgment dismissing his complaint.

One Bogart, being owner of the unexpired term of certain leasehold premises described in the complaint, executed two several mortgages of such premises; one dated May, 1851, to Jacob Christie, to secure the payment of \$2000 and interest; the other, dated June 10, 1852, to J. B. Dunham and E. Scudder, to secure the payment of the further sum of \$2000 and interest. Scudder assigned his interest in the latter mortgage to Dunham, on the 5th of October, 1852.

Subsequently, and on the 24th of February, 1853, Bogart conveyed the premises to Wm. M. Willett, subject to these two mortgages, which were to be paid by Willett, as so much of the consideration-money.

On the 22d of November, 1853, Willett, and Coburn, the present plaintiff, exchanged promissory notes with each other, each note bearing that date, and being for the sum of \$1000, and payable three months from its date, and maturing February 25, 1854.

Willett, holding the note thus made by Coburn, and having paid to Dunham \$1000 on the mortgage held by the latter, transferred this note to Dunham, as collateral or further security for the balance of said mortgage debt.

Subsequently, and on the 13th of January, 1854, Willett assigned the leasehold premises to Josephine Baker, one of the defendants, subject to the moneys then due on both mortgages, which were to be paid by the said Josephine, as part of the consideration for the said assignment.

Willett soon after this failed in business. Under proceedings supplementary to execution, the defendant Gridley was appointed a receiver of all his property and effects by an order dated the 14th of February, 1854, and made an assignment of the same date of all his property to such receiver.

Coburn paid to Dunham, on the 25th of February, 1854, the

note held by Dunham, but Willett wholly failed to pay the note which he had given in exchange for it to Coburn.

Soon after the 25th of February, 1854, Willett agreed with Coburn to obtain for him an assignment of the mortgage held by Dunham, in consideration of Coburn having paid to Dunham the note which Coburn had given to Willett, and gave an order to Scudder, who had the mortgage in his possession, to make such an assignment. On the 11th of March, 1854, Dunham executed a satisfaction piece, acknowledging payment of the mortgage, and delivered it to Benjamin H. Baker, the husband of Josephine. It was filed with the register on the day of its date. The execution, acknowledgment, and filing of the satisfaction piece were done without the knowledge of Willett or of Coburn.

The complaint prayed that the said leasehold premises, and all the right and estate of Baker and wife, and of Gridley, as receiver, in and to the same, subject to said mortgage, be sold, and that out of the proceeds the plaintiff be paid \$1000 and interest, and his costs of this action, and for such other, or other and further relief as might be just and equitable.

The action was tried before Mr. Justice Hoffman, who found the foregoing facts, and gave judgment for the defendant, dismissing the complaint. From that judgment the plaintiff appealed to the General Term.

Jno. Miller, for plaintiff and appellant, among others, made and argued the following points:—

I. After the purchase from Bogart by William M. Willett, subject to the two mortgages made by Bogart, which were allowed by Bogart to Willett as part of the consideration, and which Willett agreed to pay, he (Willett) in equity became the principal debtor on said mortgages, and Bogart security.

When Willett assigned the premises to the defendant Josephine Baker, subject to the payment of the moneys then due on the mortgages, to be paid by her as part of the consideration for the assignment, then the defendant, Josephine Baker, became in equity the principal debtor, and Willett the first security, and Bogart the second security for the payment of said mortgage. (*Marsh v Pike*, 10 Paige, 595 to 597.)

II. Subsequent to the deposit of the appellant's note with Dunham, and on the 13th of January, 1854, Willett conveyed the mortgaged premises to the defendant, Josephine Baker. After such conveyance, the parties stood thus in relation to the mortgage held by Dunham:—1. Josephine Baker, principal debtor. 2. Wm. M. Willett, first security, fortified by the note of the appellant. 3. Stephen Bogart as the second security. While the parties stood in this relation, and on the 14th of February, 1854, Willett, under the supplemental proceedings, made an assignment to James Gridley, Esq., the receiver. At this time Willett had no beneficial interest in the mortgage, nor any claim against Josephine Baker, or against the mortgaged premises, which could pass under the assignment. The payment by an assignor out of his own funds, after assignment of a debt for which he was surety before the assignment, does not vest in the receiver the claim against the principal; such claim belongs solely to the assignor, as much so as the earnings of the assignor subsequent to the assignment.

III. At the time of the assignment by Willett to the receiver, on the 14th of February, 1854, the legal and equitable rights of Willett, in relation to Josephine Baker, to the mortgage, the mortgaged premises, and the appellant's note, were simply these:—1. That Josephine Baker, or the mortgaged premises, should pay the mortgage, in exoneration of himself and the note; and 2. That thereupon the appellant's note should be returned to him.

IV. The receiver acquired no greater rights in regard to the note than Willett would have had, provided he had not made an assignment; and such rights were subject to the same equities and duties on the part of the receiver, which would have devolved on Willett, if no assignment had been made. (*Payne v. Cutler*, 13 Wend. 605–606; *Rogers v. Gwathmey*, 12 Wend. 484; *Ibid.* 14 Wend. 575; *Smith v. Van Loan*, 16 Wend. 654, 661.)

V. The utmost that the receiver can in any event claim, and all he ought in equity to claim, adverse to the interests of the appellant, is what he could have enforced against the appellant if the note had been surrendered by Dunham to the receiver.

VI. If the note had been surrendered to the receiver by Dunham, he could not have collected any thing upon it against the

appellant, as the consideration had failed. Consequently it would have been of no value in his hands. (Story on Bills, § 184.)

VII. It was the duty of Willett to either pay the note he gave to the appellant, or to redeem the appellant's note pledged with Dunham, and to re-exchange notes with the appellant. And the receiver's rights on the appellant's note would have been subject to the same duties.

J. E. Burrill, for defendants and respondents.

I. The appellant is not entitled to be subrogated to the rights of Willett in respect to the mortgage. 1. The note made by plaintiff having been made upon an exchange of paper, was based on a valuable consideration, and Dunham, having taken it in payment of the balance due on the mortgage, was a holder for value, and entitled to recover the same against Coburn. 2. The note made by Coburn to Willett, and which he transferred to Dunham, was the property of Willett, and when Coburn paid the note he paid his own debt. (*Dowe v. Schutt*, 2 Denio, 621; *Wooster v. Jenkins*, 3 Denio, 187.) 3. The note made by Coburn was not made for the purpose of being applied to the payment of the mortgage. 4. If Coburn seeks to enforce his remedy against Willett, it must be upon Willett's note, and for nothing else. (*Wooster v. Jenkins*, 3 Denio, 187.) 5. Coburn never in anywise became bound to Dunham for the payment of Willett's bond and mortgage, nor did he ever become in any way the surety of Willett, in respect thereto. (Story's Eq. §§ 331-499; *Sandford v. Mac Lean*, 3 Paige, 122; *Dowe v. Schutt*, 2 Denio, 621; *Wooster v. Jenkins*, 3 Denio, 187.)

II. The agreement alleged to have been made between the plaintiff and Willett, by which Willett agreed that Dunham might assign the mortgage to him, was made after the maturity of the notes, and consequently after the assignment to the receiver.

III. Conceding, for the sake of the argument, that by the conveyance of the premises by Willett to Baker, subject to the mortgage, the land, or the defendant Baker, became the principal debtor, and Willett became the surety, as is claimed by the plaintiff, it follows that Willett, as such surety, could have compelled Baker to have paid the debt, and to have saved Willett harmless.

although Willett had neither paid nor been sued. (Story Eq. Juris. 780, 849, 850; *Hayes v. Ward*, 4 John. Ch. 132; *Champion v. Brown*, 6 ib. 406–7.) 2. The mortgage was due at the time of the conveyance to Baker, and if the latter assumed the payment, and covenanted to pay, then there was a breach of the covenant instanter. 3. The right of Willett to compel Baker to pay, or his right of action against Baker for not paying the mortgage, are *choses in action*, which passed by the assignment from Willett to the receiver, on the 14th of February, 1854.

IV. The judgment should be affirmed.

BY THE COURT. BOSWORTH, J.—The view taken of the plaintiff's rights and position, by his counsel, we understand to be, in brief, this:—

If the note made by Coburn had continued in Willett's hands until the defendant Gridley was appointed receiver, and had, on that day, been delivered to Gridley, as such receiver, Gridley could not have maintained an action upon it, because the consideration of it had wholly failed, by reason of the insolvency of Willett, and his consequent inability and failure to pay the note which he gave in exchange to Coburn. That the note would have been valueless and invalid in the hands of such receiver.

That at the time Willett assigned to the receiver, the legal and equitable rights of Willett, in relation to Josephine Baker, and to the mortgage, and to the mortgaged premises, and to Coburn's note, were: 1st. That Josephine Baker, or the mortgaged premises, should pay the mortgage, in exoneration of himself and the note, and, 2d. That thereupon Coburn's note should be returned to him.

That Coburn having been compelled to pay the note, because it had been hypothecated to Dunham, and the debt which it was made to pay being one which the mortgaged premises or Josephine Baker should pay, and for the payment of which Willett was a mere surety as between himself and Josephine Baker, the plaintiff was, in effect, a surety for Willett, and should be subrogated to his rights.

In *Dowe v. Schutt* (2 Denio, 623) the court held, that when two persons exchange notes, each taking the note of the other, of the same date and amount, and each payable at the same time, each

note is the proper debt of the maker thereof, and each holder is a purchaser for value. As the note taken by either is a debt due to the holder, and is his property, he may sell it on such terms and at such price as he pleases. Although discounted on usurious terms, that cannot affect its validity as respects the maker. That in such cases the relation of principal and surety does not exist, and that a promise of either maker to indemnify the other cannot be implied. The cases uniformly hold and fully sustain these propositions. (*Rice v. Mather*, 3 Wend. 62; *Cameron v. Chappell, et al.*, 24 Wend. 94; Chitty on Bills, 84-85.)

In *Wooster v. Jenkins* (3 Denio, 187) the question was fully considered, and the court held, that after such an exchange of notes the rights of each holder were the same as if he had taken the note held by him for money paid or goods sold. That each party was bound to pay his own note, and that no contract of either to indemnify the other could be implied. That the remedy of each was on the note he had taken, and neither could recover against the other, in an action for money paid to the use of the party making the note which had been paid.

The settled doctrine would seem to be, that any indorsee of such a note, before its maturity, has the same rights against the maker of it as if each note had its origin in a distinct and independent transaction, and the consideration of it was property sold and delivered to the maker.

These views, if sound, dispose of the whole case. The note, if it had been held by Willett, and if it had passed into the hands of Gridley, as receiver, on the 14th of February, 1854, would have been valid and available in his hands, and collectible for the benefit of the particular creditors of Willett, at whose suit Gridley was appointed receiver.

Under such circumstances, if any one has a right, in consequence of the payment of this note to Dunham, to resort to the mortgaged premises to obtain payment of the amount of this note, it is Gridley, the receiver, and he would hold whatever he might collect for the judgment creditors of Willett, at whose suit the receiver was appointed. (*Nantucket Pacific Bank v. Stebbins, ante*, 341.)

Although Willett had failed, even if no receiver had been appointed, and Willett had then held the note made by Coburn, the

latter could not have instituted an equitable action, on the 14th of February, 1854, to compel the set off of one note against the other, because neither note was then due. (*Keep v. Lord*, 2 Duer, 78; *Bradley v. Angel*, 3 Com. 475.)

We think the present action cannot be maintained on the facts found. The complaint was properly dismissed, and the judgment must be affirmed, with costs.

MARTHA GARNER, and others v. THE MANHATTAN BUILDING ASSOCIATION.

In an action to recover the possession of real estate, a complaint which states that, on a day named, a person, whose name is given, was in possession and seized thereof in his own right in fee, and died so seized and possessed; that the plaintiffs are his only heirs at law, and, as such, are seized in fee and entitled to the possession; that the defendant is wrongfully in possession, claiming title, and refuses to give up possession, though requested so to do, states facts constituting a cause of action.

The defendants, by their answer, and by the evidence given at the trial, claiming a right to the possession under an unexpired lease, executed by the plaintiffs' ancestor, in his life-time, *held*, that it was competent for the plaintiff to prove in reply any facts which put an end to the lease, or gave a right to the plaintiffs to require the possession to be given up to them, and the defendants' possession to be wrongful.

(Before OAKLEY, CH. J., BOSWORTH and HOFFMAN, J.J.)

Submitted, February 18; decided, March 28, 1857.

THIS action comes before the court on an appeal by the defendants from a judgment entered on the report of a referee. It was commenced about the 25th of May, 1855, and was brought to recover the possession of certain real estate described in the complaint.

The complaint states, that on and before the 1st of May, 1843, one John Garner, then of the county of Rockland, and state of New York, was seized in his own right in fee, and lawfully possessed of all that certain lot, piece, or parcel of ground, situate and being in the city of New York, and particularly describing it.

The said John Garner died, so seized of the said lands and premises, some time in the said year 1843, intestate, leaving him surviving his widow, the said Martha Garner, and his children,

and sole heirs-at-law, the plaintiffs, Frederick Garner, Mary Garner Ward, now the wife of the plaintiff, Adam H. Ward, and David Garner.

The said plaintiffs, Frederick Garner, Mary Garner Ward, and David Garner, are seized in fee and entitled to the possession of the said lands and premises, subject to the life estate of the said Martha Garner, in one equal undivided third part of the same.

That the said David Garner is an infant under the age of twenty-one years, and that the said Adam H. Ward, by an order duly made by this court, has been appointed his guardian, for the purpose of prosecuting this action on his behalf.

The defendants are a corporation or association organized under the laws of the state, and the plaintiffs have been informed and believe, that the defendants are wrongfully in possession of the said lands and premises, and wrongfully claim a right thereto, and, although often requested, have refused, and still refuse, to deliver up possession of the said lands and premises to the plaintiffs, and unjustly withhold the possession thereof from them.

By reason of such continual wrong-doing on the part of the said defendants, the plaintiffs have sustained damage to the amount of three thousand dollars.

Wherefore the plaintiffs demand judgment against the said defendants for said sum of three thousand dollars, together with the costs of this action, and also that the defendants deliver up to the plaintiffs possession of the said lands and premises, and every part thereof.

The defendants by their answer made title, under a lease of the premises dated May 1, 1843, executed by John Garner to one Derrick D. Foster, for twenty-one years from that date; an assignment of the lease by Foster to Demarest, and by Demarest to John McDonald, and a mortgage of the premises by McDonald to the defendants on the 19th of November, 1851, to secure the payment of \$4000 lent to him by the defendants, and a foreclosure of such mortgage, and a purchase of the unexpired term of the lease by the defendants at the foreclosure sale.

The facts thus alleged in the answer having been proved, the plaintiffs put the lease from Garner to Foster in evidence.

The lease contained these covenants on the part of Foster, the lessee, viz.

“ And it is agreed, that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises, or to distrain for any rent that may remain due thereon. And the said party of the second part doth covenant to pay to the said party of the first part, the said yearly rent as herein specified.

“ And further, the said party of the second part shall, from year to year, during the term of the lease, pay, or cause to be paid, all ordinary and yearly taxes on said lot, assessments for public improvements herein excepted; which assessments shall be paid by the said party of the first part.”

The plaintiffs proved—the defendants objecting and excepting to the admission of the evidence—that the tax on the lot and premises for the year 1853, being exclusive of interest \$27.15, was confirmed on the 20th of July, 1853, was returned as unpaid in the month of June, 1854, and was paid in the following March by the plaintiff, it then amounting with interest to \$32.28; that the taxes for 1854, amounting to \$23.23, and the Croton water taxes for 1853 and 1854, amounting for each year to \$10.35, remained unpaid until the 5th of March, 1855, when they were paid by the plaintiffs.

The last payment of rent made under the lease was made on the 22d of November, 1854, and in full for rent up to the first of that month. Neither of the plaintiffs then knew of any of the defaults in the payment of taxes.

The referee decided that the plaintiffs were entitled to the possession of the lands and premises, that the defendants wrongfully withheld the possession from them, and that the plaintiffs recover the possession. No exceptions were taken to this decision. Judgment having been entered on the report, the defendants appealed from the judgment.

A. B. Tuppen, for defendants and appellants, made and argued the following points:—

I. The complaint does not state facts sufficient to constitute a cause of action. 1. Under the statute, the plaintiff should aver in his complaint, that on some certain day, which shall be after

his title accrued, he was possessed of the premises, and that being so possessed thereof, the defendant on some certain day to be stated, entered, etc.; there is no such averment in the complaint (2 R. S. 4 ed. 566; 10 Wend. 414; 2 Duer, 673; 6 Cow. 147.)

II. The issue upon which this action was determined is not presented by the pleadings, and the referee erred in admitting the testimony. If the plaintiff claimed a forfeiture of lease as the ground of action, the defendant ought to be so advised, and all the material facts should be averred to raise the question of forfeiture. The unlawful withholding is a question of law. The courts have always been strict in their requirements to prevent forfeitures (2 Duer, 673, above cited; 5 Denio, 129.)

III. The taxes reserved in the lease are in the nature of a reservation of rent, (Taylor's Landlord and Tenant, 2d ed., § 395,) and a complaint in ejectment for rent would not be good without full averments. (2 Revised Statutes, 4 ed. 750.)

IV. If taxes be not in the nature of a reservation of rent, the landlord must show a demand in order to sustain his action. (17 Johns. 66.)

V. The covenant to pay taxes does not, in the lease in question, bind the assignee of the lessee, and therefore does not run with the land. The assignee is liable only for his own default. (15 Johns. 278; 4 Selden, 468, and cases there cited.)

VI. The plaintiffs received rent after the time when it appears by the tax records the taxes were unpaid, and this is a waiver of forfeiture. If the defendants are to be charged with knowledge of the tax from the tax books, so also are the plaintiffs. The tax books are public records. (See Act in relation to taxes in the city of New York, 1 R. S. 4 ed. 763.)

VII. No taxes were unpaid at the commencement of this action. If the plaintiffs paid them, they have an action for re-imbursement. The evidence shows that the defendants used due diligence in ascertaining and paying all arrears, and the plaintiffs' own act, in paying the taxes while McDonald was in possession, and in omitting to bring their action until long after defendants purchased, is a waiver of forfeiture.

VIII. The plaintiffs, having violated their covenant for payment of assessments, cannot maintain an action against the defendants, while they, the plaintiffs are in default.

IX. The assignee of the reversion has not the right of re-entry, unless the covenant is with the lessor, his assigns, etc. (Comyn's Landlord and Tenant, 151.)

X. The referee's report is erroneous, and the judgment thereon should be reversed.

Geo. A. Schufeldt, for plaintiffs and respondents.

BY THE COURT. BOSWORTH, J.—But one exception was taken during the progress of the reference, and no exception was taken to the final decision of the referee. At all events no such exception appears in the case. Only two questions of law arise on this appeal. Those questions are, first, does the complaint state facts sufficient to constitute a cause of action? and second, is the exception, which was taken during the trial, tenable?

The defendants, in their printed points, take the position that the complaint does not state facts sufficient to constitute a cause of action. This objection may be raised in any stage of the action. (Code, § 148.)

The complaint states that John Garner was seized of the premises in question, in his own right in fee, and was in the lawful possession of them on and before the 1st of May, 1843. That he died so seized, in that year, intestate, leaving one of the plaintiffs, his widow, and the other plaintiffs, his only heirs-at-law him surviving.

That those named as heirs are seized in fee, and entitled to the possession, subject to the life estate of the widow in an undivided third part thereof. That the defendants are wrongfully in possession, and claim a right thereto, and although often requested, have refused, and still refuse, to give up the possession, and unjustly withheld possession from the plaintiffs, and prays judgment that they deliver up possession to the plaintiffs.

We think there can be no doubt, that such a complaint, under the Code, is good on general demurrer. (Code, §§ 142, 471.)

The objection taken during the progress of the trial was general, and was to the effect, that no evidence was admissible, under the pleadings, to show the non-payment of taxes or the breach of any of the covenants contained in the cause.

It was competent for the plaintiffs to prove any matter which, in

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legal effect, would avoid the lease, and prevent its operating as a bar, or obstacle, to the plaintiffs' right to recover. The Code performs, for the plaintiffs, the office of a pleader, who can commit no mistake, in replying to an answer which sets up, by way of defence, new matters, not constituting a counter-claim. It pleads for him, and in proper form, in avoidance of the answer, any matter which it is in his power to prove, and which is sufficient to accomplish that result. (Code, § 168.)

It follows that neither of the questions of law, which the defendants are permitted to raise on this appeal, is tenable.

The case of *Garner v. Hannah*, decided at the October General Term, 1856, is decisive of all questions in this case relating to the merits. *Ante*, 262.

The judgment must be affirmed, but with liberty to the defendants in this action, by notice, or on petition, to apply for such relief against it as they may be advised, and without prejudice to their right to bring an action to obtain such relief, if so advised.

THOMAS PRICE v. JOHN MCCLAVE, and others.

In an action upon a promissory note, which is set forth in the complaint the word "signed" prefixed to the signature of the maker, is a sufficient averment that the note was made by him, and the word "indorsed" prefixed to the signature of the payee is a sufficient averment of his indorsement. Where the action is against an individual as the maker of the note, and it is signed in the name of a partnership, and there is no averment that it was so signed by the defendant, the complaint is bad upon demurrur, as not showing upon its face an individual liability.

As against an indorser, an averment in the complaint that the note was "protested for non-payment," is not equivalent to an averment that the note was presented to the maker and payment refused; since a protest may, in fact, have been made, and yet the note not have been presented for payment to the maker. The complaint, therefore, as not showing the facts necessary to be proved to charge an indorser, is bad upon demurrur.

Judgment for defendants affirmed.

(Before HOFFMAN and SLOSSON, J.J.)

January 8; March 21, 1857.

APPEAL by plaintiff from a judgment at Special Term sustaining a demurrur to the complaint.

The pleadings and the grounds of demurrer are set forth sufficiently in the opinion of the court.

D. J. Walden, for the plaintiff.

W. Silliman, for the defendants.

BY THE COURT. SLOSSON, J.—This is an appeal from a judgment at Special Term sustaining a demurrer to the complaint.

The complaint alleges that the “defendants are indebted to the plaintiff in a promissory note written in the words and figures following.” A copy of the note here follows. It is subscribed, “John McClave & Co.,” with the prefix “signed,” and is made payable to the order of Henry McClave, and the names Henry McClave and James Cain are subjoined as part of the copy of the instrument, with the prefix “indorsed.” The complaint then alleges, “that before the note became due and payable, it was passed to the plaintiff for a good and valuable consideration; that he is the holder and owner of the note, and only person interested therein; that the whole amount thereof is justly due and owing to him from the defendants; and that when the note became due, it was protested for non-payment, of which the defendants, McClave and Cain had due notice,” and therefore demands judgment.

The Judge, at Special Term, held, that the complaint was bad in not averring that the note was made by McClave, and made by him in the name of McClave & Co.; also, in not averring that the note had been indorsed by the defendants, McClave and Cain, and also in not averring that it had been duly presented to the maker for payment, and payment refused; and relied for his judgment on the cases of *Lord v. Cheeseborough*, (4 Sand. 696,) and *Aldet v. Bloomingdale*, (1 Duer, 601.)

In the first of these cases there was an allegation that the note was “indorsed,” but none that it was indorsed and delivered to the plaintiff, or that the plaintiff was the holder or owner of the note.

In *Griswold v. Lavery*, (12 Legal Ob. 316,) this court decided that an allegation that a note was indorsed, coupled with an allegation of actual possession by the plaintiff before the maturity of

the note, was equivalent to an allegation of an indorsement to the plaintiff.

In the present case there is no allegation of an indorsement, unless the prefix "indorsed," may be considered as an averment of the fact, either by itself or in connection with the words "written" or "passed," underscored in the complaint. It is true that a promissory note, as to the indorser, may not strictly be an instrument for the payment of money only within the meaning of section 162, his engagement being a conditional one, (*Alder v. Bloomingdale, supra*,) and that the names of the indorsers in the copy of the note in this complaint, may not, as respects them, be the copy of any instrument within the meaning of that section, but it does not follow, that the word "indorsed," has, therefore, no meaning in the complaint. The word is certainly no part of the note, nor is it thus written as a part of it. In fair interpretation, however, it can only mean, that the instrument of which the copy is given, was indorsed by the payee and the other indorser Cain.

In *The Bank of Geneva v. Gulich*, (8 Howard, Pr. R. 51,) the court seemed to admit that the word "signed" prefixed to the name of the makers, and the abbreviation "ind'd," to that of the indorsers might be regarded as allegations of the making and indorsing of the note. If, however, the word "indorsed" would not alone amount to this, though we think it does, it may, without any violation of the sense of the pleading, be well coupled with the word "passed," which follows almost immediately after, and read together, the two can hardly fail to be understood as an allegation or an intended allegation of the transfer of the note to the plaintiff by indorsement.

This, in connection with the averment, that the plaintiff is the holder and owner of the note, is sufficient, so far as this question is concerned, to make the pleading a good one within the case of *Lord v. Cheeseborough*, and to establish that the title to the note is in the plaintiff.

Then as to the want of an averment, that the note was made by McClave, and in the name of John McClave & Co., the word "signed" prefixed to the name of the makers must certainly have as much significance as the word "indorsed" prefixed to the names of the indorsers.

In the case of *Andrews v. The Astor Bank*, (2 Duer, 629,) the defendants were sought to be charged as acceptors of a bill of exchange. As there could be no doubt that the instrument, as respected the acceptor, was one for the payment of money only, within § 162 of the Code, the pleader seemed, in framing his complaint, to have studied how literally he could come within the very words of the statute, and accordingly all he averred was, that he was the holder and owner of the bill, a copy of which he set out; that no part of it had been paid, and that the whole account was due to him from the defendant. The bill was addressed "To John Lloyd, Esq., President of the Astor Bank," and was accepted in the name of "John Lloyd, president," and it was made a ground of demurrer that there was no allegation that the bank accepted, or that Lloyd was its president, or had authority to accept, or did accept, as its president, and that, therefore, the complaint did not state facts sufficient to constitute a cause of action; but the court (at Special Term) held, that "any ordinary man of common understanding, holding, or being offered, such a bill, would read it as being a bill drawn on the Astor Bank, and accepted by the bank, by its president," and decided that the complaint contained all that was required by § 162 of the Code. As the contract of the maker of a promissory note is equally with that of an acceptor of a bill of exchange, one for the payment of money absolutely, the allegation of the making of the note, in the present case, must be held as well made as was that of the acceptance of the bill in the *Astor Bank* case; indeed, in the latter, there was no averment of an acceptance at all, except as furnished by the copy of the instrument itself; and I am at a loss to perceive why this complaint would not, as respects the maker, have been by parity of reason, good without the prefix "signed," or the word "written," or any other word indicating the making of the note.

I am not aware that the decision in that case has ever been appealed from, and am not disposed to question its correctness. Within the principle of this decision, also, I think the identity of the persons named as maker and indorsers of the note with the defendants to the action, sufficiently established in the complaint. The note being signed "John McClave & Co.," is that such a variance on the face of the note, as to deprive it of the character of the individual note of McClave in which character it is declared

upon? Should it have been alleged that it was signed by McClave in the name of McClave & Co.? We think it should. The words "& Co.," indicate a firm. John McClave, the defendant, may have been a member of that firm, and yet never have made the note, nor have had any knowledge of its existence. It may have been made by some other member of the firm, for his private purposes, and passed to the plaintiff under circumstances of notice, or otherwise, which would wholly relieve the defendants from all liability on the note. It will not do to call the words "& Co." a mere adjunct or surplussage. If the pleader relies on the copy of the note as sufficient, under § 162, then it shows the note to have been made by a partnership, and not by McClave individually. Some averment was, therefore, necessary to obviate this objection. It is not an answer to say that it is an objection which should have been taken advantage of by special demurrer. The objection is not strictly for defect of parties, but that the complaint does not, on its face, show an individual liability on the part of McClave.

The only remaining question is, whether the allegation that when the note became due it was "protested for non-payment," is sufficient, without the allegation that it was presented to the maker and payment refused?

In *Coddington v. Davis* (1 Coms. 186) the Court of Appeals held that the word "protest," in its popular sense, includes all the steps necessary to fix the indorser, to wit, demand of payment, refusal, and notice. The question, however, arose on the construction of a mercantile letter, by an indorser of a note addressed to the holders, and agreeing to "waive the necessity of the protest of the note."

So in *Cook v. Litchfield*, (5 Sanf. 330,) the court held, that the word "protested" in a notice of protest, necessarily implied a demand of the maker and refusal.

We do not suppose these cases authoritative on a question of pleading, yet the Supreme Court in the Fourth District, in the case of *Woodbury v. Sachrider*, (2 Abbott's Pr. Reports, 402,) held, on the strength of *Coddington v. Davis*, that the words "duly protested at maturity," in a complaint, were sufficient to admit evidence of demand, neglect, or refusal to pay, and notice of non-payment.

Unless the words "protested for non-payment," are to have the effect of an allegation of presentment to the maker, and refusal on his part to pay the note, essential conditions to the indorsers' liability, then this complaint is clearly insufficient as to the indorser, whose contract is not of the class intended by § 162, as distinctly decided by this court in *Alder v. Bloomingdale*, above cited.

I am not disposed to give to these words so broad a construction as that given to them in *Woodbury v. Sachrider*, nor to favor so loose and indefinite a style of pleading. To allege that a note was protested for non-payment, is entirely consistent with an entire omission to present the note at all, since the notary may have noted his protest falsely. The essential fact to charge the indorser, is presentment to and refusal of payment by the maker; a protest assumes these conditions to have been complied with, and yet, in fact, the protest may be made while presentment never was.

It is no answer to say that a notarial protest of a promissory note is not necessary, and therefore the pleader must have intended, not the formal certificate as evidence of protest, but the acts which the protest implies; since, if the word is capable of two meanings, one, as defining the act of the notary, and the other, the steps necessary to charge the indorser, it is evident that of itself alone, it does not distinctly determine its own meaning; and, therefore, cannot, with propriety, be said to state any fact which goes to constitute a part of the cause of the action. (*Ante*, 514.)

The judgment at Special Term should be affirmed as to both demurrers, the plaintiff to be at liberty to amend his complaint within twenty days after notice of entry of this decision, on payment of costs of demurrer. (a)

BROWN v. DAVIS.

Prior and up to the 23d of September 1, 1850, the firm of Evans, Davis and Lown, owed plaintiff \$14,069.88, for moneys advanced to it, and for which he held their notes. That firm dissolved that day, and Evans and Davis formed a new firm

(a) See *Price v. McClave* (5 Duer, 570); *Prindle v. Caruthers* (15 N. Y. R. 425)

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with Dodge, under the name of Davis, Evans and Dodge. Plaintiff gave up the notes of the old firm and took two new notes of \$7500 each, dated September 28, 1850, payable "on demand after date," one of which was signed by Evans, and the other by Davis, of the firm of Evans, Davis and Lownd.

Plaintiff signed the partnership agreement of Davis, Evans and Dodge; that stated, that the amount of \$15,000 due to the plaintiff from the old firm "is to remain in the new concern during the continuance of the copartnership," he receiving interest at the rate of seven per cent. per annum. Under same date, Davis, Evans and Dodge and the plaintiff, signed a paper stating they had received from plaintiff \$15,000, "being the amount contributed by him as special partner to the concern of Davis, Evans and Dodge." Davis, Evans and plaintiff, signed another paper of the same date, stating that they had formed a limited partnership under the name of Davis, Evans and Dodge, the nature of its business, the residence of the partners, that plaintiff is the special partner, and as such has contributed \$15,000 in cash, and that Davis, Evans and Dodge, were the general partners. Enough was not done to create a limited partnership. The new firm failed and was dissolved within a year, and before this suit was brought, owing some \$30,000 more than it could pay. This suit is brought on the note for \$7500 given by Davis to plaintiff when the new firm was formed. On that note, and also on the other note for a like sum, given by Evans, there is indorsed: "This note is given as security to Levi Brown, (the plaintiff,) for one half of the \$15,000 advanced to Davis, Evans and Dodge. ~~ROBERT~~ DAVIS."

- Held*, 1. The plaintiff never discharged Davis and Evans from liability for the amount the firm of Davis, Evans and Lownd owed him, but took the note of each for half of that sum.
2. Though that sum was continued, in the assets which represented it, as a loan to the firm of Davis, Evans and Dodge, it was not placed, as between themselves, at the risk of its business, nor lent on an agreement to look solely to the new firm for payment.
3. The note in suit became due, on demand of payment, made after the new firm had actually dissolved, and plaintiff could sue on the note without having first sued and exhausted his remedies by action against the new firm.
4. The evidence given is insufficient to establish an intent of Davis, Evans and Dodge, and of the plaintiff, by the arrangement in respect to a limited partnership, to defraud the public, or that they knew their acts were invalid, or that they were done with an improper motive.
5. The plaintiff is entitled to a judgment on the verdict. Permitting such a recovery will not withdraw from the legal or equitable process of the courts any property which should be appropriated to the creditors of the new firm, though held to be composed of Davis, Evans and Dodge, and the plaintiff, as general partners. A judgment by such creditors against the four, and appropriate ulterior proceedings, will reach all the individual property of each, as well as all the effects of the new firm.

(Before OAKLEY, CH. J., BOSWORTH and HOFFMAN, J.J.)

March 28, 1857.

THIS action was tried before Chief-Justice Oakley, and a jury,

in November, 1856. A verdict was ordered for the plaintiff for the amount claimed, subject to the opinion of the court, whether the action could be maintained upon the facts which the evidence given established, and the case was directed at the trial to be heard in the first instance at the General Term. The plaintiff moves for judgment on the verdict. The case presented to the General Term was in the words following, to wit:

“This was an action on the following promissory note:

“\$7,500.

“New York, September 23d, 1850.

“On demand, after date, I promise to pay to the order of Levi Brown seven thousand five hundred dollars. Value received.

“ROBERT DAVIS.”

Endorsed.—“This note is given as security to Levi Brown for one half of the fifteen thousand dollars advanced to Davis, Evans & Dodge.

“ROBERT DAVIS.”

The complaint was in the usual form.

The answer was as follows:

“Robert Davis, the defendant in this action, for answer to the complaint of Levi Brown, plaintiff, says: That he admits making the promissory note in the said complaint mentioned; that he denies the said promissory note became due and payable; that he denies that the plaintiff is the lawful owner and holder of the said promissory note; that he denies that he is indebted unto the plaintiff on the said promissory note in the sum of seven thousand five hundred dollars, with interest thereon from the 23d day of September, 1850; and, for a further defence, this defendant says, that the said promissory note was made and delivered to the plaintiff without any consideration whatever having been paid for the same, and was given to the plaintiff with another promissory note, as a memorandum, for the purpose of showing that the plaintiff had paid into the firm of Davis, Evans & Dodge, of which said firm the plaintiff and defendant were copartners, his, the plaintiff's share of capital in trade, agreed to be put into the said firm by the plaintiff, and for no other purpose whatever.

“Wherefore, the defendant demands that the said complaint be

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dismissed, and that he may recover of the plaintiff his costs of suit.

"L. D. FREDERICKS, att'y for def't."

The cause came on for trial on the 25th day of November, 1856, before Chief-Justice Oakley, and a jury.

The plaintiff read in evidence the note declared on, and the indorsement thereon, and rested his case.

The defendant called several witnesses, from whose evidence, and that of a witness of the plaintiff, called in reply, the following facts appeared :

That for about two years previous to the 23d of September, 1850, a partnership had existed between Francis B. Evans, the defendant Davis, and Charles Lownd, in the business of the manufacture and sale of files, in the city of New York. To this firm the plaintiff had advanced money from time to time by way of loan, so that on the said 23d of September, 1850, they were indebted to him for such advances in the sum of \$14,069.38, for which he held their notes. On that day the firm was dissolved by mutual consent, and a new partnership was formed to continue the business, from and after the dissolution, by the defendant, said Evans, and David S. Dodge, under the style of Davis, Evans & Dodge. The agreement of partnership was in writing, bearing date the 23d of September, 1850, and with the receipts and stipulations indorsed thereon, was given in evidence, and is hereto annexed, marked "A." To this agreement the plaintiff was also a party, and appended his signature, as thereby appears. And, with the assent of the plaintiff, an advertisement of the formation of the partnership was published by the firm, which is given in evidence, and is hereto annexed, marked "B." It further appeared that, in pursuance of the articles of agreement, the plaintiff, on the same day, and at the time of their execution, transferred to the new firm the loan he had made to the old one, by executing his receipt (indorsed on the articles) to the old firm for the amount due him, \$14,069.38, and taking the receipts of the new firm (also indorsed on the articles) for \$15,000. It did not distinctly appear how the difference was made up, but no part of the \$15,000 was paid or advanced by the plaintiff, or received by the new firm, in cash or otherwise, than as above stated. The plaintiff was thereupon credited on the books of the new firm with the sum of \$15,000 cash.

And the plaintiff thereupon received from the defendant the note in suit, and from said Evans another note for the same amount, and of the same tenor at the time of the execution of said articles, both given for the advance of \$15,000 made by the plaintiff, as above stated, and for the purpose of securing its repayment. And at the same time gave up the notes which he held against the old firm.

It further appeared that the old firm, at the time of its dissolution, though still conducting business, was in reality insolvent. That the new firm failed for a large amount, about one year afterwards, being insolvent, to the extent of \$30,000. And that no part of plaintiff's advance, or the interest thereon, or of either of said notes, had ever been repaid him, except three small items of cash charged him in the books of the firm, amounting to about \$100.

Upon these facts the Chief-Justice directed a verdict for the plaintiff for the amount due on the note and interest, subject to the opinion of the court upon the question whether the action could be maintained upon the foregoing facts, and directed the case to be heard in the first instance at the General Term, with leave to either party to turn the case into a bill of exceptions.

And the jury accordingly returned a verdict for the plaintiff for \$10,740.38, subject to the opinion of the court on the questions reserved.

EXHIBIT A.

This memorandum of agreements made this twenty-third day of September, 1850, by and between Robert Davis and Francis B. Evans of the first part, and David S. Dodge of the second part, witnesseth:

That the said party of the first part, having been engaged in the business of manufacturing and vending files, under the name of the American File Works, and being the sole and exclusive owners of a certain file machine, invented by John Crum, which is styled "An invention for the cutting of files," entered by caveat in the patent office of the United States, at Washington city, by said John Crum, on or about June 11th, 1850, and the same having been assigned subsequently by said John Crum to the said Robert Davis and Francis B. Evans, propose to the party of the

second part, for the consideration hereinafter named, to form a copartnership for the purpose of continuing and extending the said business of manufacturing and vending files of every kind and description, and more especially for the greater facilities afforded to said copartnership for the sole and exclusive use of said patent file machine in the United States, for carrying on extensively said manufactures in all the various branches; and to sell one-third interest in the general business as now and heretofore carried on, as per exhibit in their books this day as a basis; it being understood and agreed that the amount of fifteen thousand dollars, which appears by said exhibit to be due to Levi Brown, is to remain in the new concern, during the continuance of the copartnership, by the consent of said Levi Brown, which is annexed to these articles of agreement; he, said Levi Brown, receiving interest for the same at the rate of seven per cent. per annum.

The said parties of the first part also agree to sell to the party of the second part, an undivided third part of said "invention for the cutting of files," or patent right, and assign the same for record, on the books of the patent office at Washington; it being understood that such patents as may be obtained in foreign countries shall inure to the exclusive benefit of the party of the first part, but not to be used in any way to the injury of the American business.

The patent in the United States to be used only for the joint benefit of the copartnership.

The party of the second part agrees to furnish capital to the new concern as follows:

Ten thousand dollars at the signing and sealing of these articles of agreement. Five thousand dollars during the year one thousand eight hundred and fifty. Five thousand dollars during the year one thousand eight hundred and fifty-one. Also, for the further accommodation of the new concern, to furnish the name of William E. Dodge as confidential indorser, as may be necessary from time to time, to the amount of twenty thousand dollars. And, also, for the undivided one-third interest in said patent, the party of the second part agrees to pay the party of the first part for their exclusive benefit, ten thousand dollars at the signing and sealing of this agreement. And, also, twenty-five per cent. of his

net profits annually, till said sum so deducted shall amount to the like sum of ten thousand dollars. It is understood that any difference in amount of capital furnished by either shall be adjusted by interest. It is also understood, that any agreement made between the party of the first part and John Crum, shall inure to the new concern, and any improvements which may be made to the present patent machine, or to any other part of the manufacture of files, shall also pass to their benefit, it being understood, that if any new patents are taken out, they shall be also owned by the new concern in the same proportion as the original for the United States; but if any foreign patents are obtained, they shall be at the expense, and for the benefit of the party of the first part, they also paying the just proportion of any expense incurred in perfecting the same.

This copartnership shall continue for the term of ten years, unless sooner dissolved by death or mutual consent. In case of the death of either partner, his capital shall remain in the business, and his estate shall receive twenty per cent. of the profits, unless his representatives shall prefer to sell his interest. The business shall be conducted under the name of Davis, Evans & Dodge. Neither partner shall use the name of the firm to the benefit of himself or others, without the foreknowledge and consent of each of the other partners. Neither partner shall draw from the concern more than sufficient for his own or his family expenses without the consent of the other partners. It is also mutually agreed between the parties, that in case any difficulty shall arise during the prosecution of the business, or in the final settlement of the same, Francis B. Evans and David S. Dodge, shall each choose a competent and disinterested person, and the persons so chosen shall choose a third to whom all matters shall be submitted, and their decision shall be final, and forever binding on the parties.

To the faithful performance of these obligations we hereunto affix our names and seals, this day and year above written.

Witness: NATH'L DAVIS, Jr.

ROBERT DAVIS, [L. S.]

FRANCIS B. EVANS, [L. S.]

DAVID S. DODGE, [L. S.]

LEVI BROWN. [L. S.]

Received, New York, September 23d, 1850, from Evans, Davis

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& Co., by the hands of Robert Davis and Francis B. Evans, fourteen thousand sixty-nine dollars and thirty-eight cents, in full.

LEVI BROWN.

We have this day received the sum of fifteen thousand dollars from Levi Brown, being the amount contributed by him as a special partner to the said concern of Davis, Evans & Dodge.

New York, September 23d, 1850.

ROBERT DAVIS,
FRANCIS B. EVANS,
DAVID S. DODGE,
LEVI BROWN.

The true meaning of the foregoing agreement is this, viz.: That Levi Brown, the special partner, is to receive at the rate of seven per cent., semi-annually, on the \$15,000 advanced by him, and of the net profits of the business, Robert Davis, Francis B. Evans, and David S. Dodge are each to receive an equal amount, or thirty-three and one-third per cent.

ROBERT DAVIS,
FRANCIS B. EVANS,
DAVID S. DODGE,
LEVI BROWN.

EXHIBIT B.

The copartnership heretofore existing under the firm of Evans, Davis & Co., is this day dissolved by mutual consent. Francis B. Evans and Robert Davis are alone authorized to use the name of the firm in liquidation.

Dated September 23d, 1850.

FRANCIS B. EVANS,
ROBERT DAVIS,
CHARLES LOWND.

Limited Partnership.—The undersigned have, pursuant to the provisions of the Revised Statutes of the State of New York, formed a limited partnership, under the name or firm of Davis, Evans & Dodge; that the general nature of the business to be transacted is the buying, selling, and manufacturing of files, under the name of the American File Works. Levi Brown, whose place of residence is in the city of Brooklyn, is the special partner, and Robert Davis, whose place of residence is in the city of New York,

Francis B. Evans, whose place of residence is in the city of Brooklyn, and David S. Dodge, whose place of residence is in the city of New York, are general partners; and that the said Levi Brown has contributed, as such special partner, to the common stock fifteen thousand dollars in cash. The said partnership is to commence on the twenty-third day of September, 1850, and will terminate on the twenty-third day of September, 1860. Dated this twenty-third day of September, one thousand eight hundred and fifty, at the city of New York.

ROBERT DAVIS,
FRANCIS B. EVANS,
LEVI BROWN.

New York, September 23d, 1850.

The subscribers will continue the manufacture of files at the American File Works, at Ramapo, and are making extensive preparations to introduce their American Patent Files.

DAVIS, EVANS & DODGE,
No. 212 Pearl-street, New York.

E. J. Phelps, for plaintiff, made and argued the following points:

I. The consideration of the note in suit, was one-half the loan of \$15,000 made by the plaintiff to the defendant and his partners. This sum was advanced in cash to the former firm, and their notes taken therefor, and was transferred to the new firm by agreement, the first notes being taken up, and this note, with another of the same tenor, given in their stead. This fully appears from the case, and is also shown by the indorsement on the note, which is conclusive between the parties as to the consideration.

II. The contract between the parties did not make the plaintiff a partner, either special or general, in the firm of Davis, Evans & Dodge. He had no interest in the profits or loss. His advance to the firm was a mere loan, to be repaid with legal interest.

● III. The notes given the plaintiff for this loan, by Evans and the defendant, in place of those he held against the old firm, were, therefore, in any view, perfectly valid in their inception, and founded upon a sufficient consideration.

IV. The subsequent advertisement by the parties, under a mistake as to the legal effect of the transaction, that the plaintiff had

become a special partner, did not invalidate these notes. Whether it operated to make the plaintiff liable to creditors as a general partner, or whether a judgment upon this note would be permitted, in equity, to take precedence of a creditor's judgment, who had trusted the creditors on the faith of the advertisement, are very different questions. The case shows no such illegal intent as would preclude legal remedies, and, among themselves, the rights of the parties must depend upon the real contract between them. Under that contract, the validity of the notes is unquestionable. Certainly the mere publication of a mistaken advertisement, which did no harm so far as appears, and was not intended to do any, could not divest the plaintiff of his right to recover for money previously and honestly loaned.

V. Even if the plaintiff could be regarded as a special partner, he would still be entitled to recover in this action. 1. Because no defence growing out of this fact is set up in the answer. The defence disclosed by the pleadings is entirely different. In no case can a defendant plead one defence, and rely at the trial upon another; and least of all where the defence is technical and without merit. 2. If the facts were properly pleaded, they amount to no defence, as between the parties, whatever might be their effect between the firm and its creditors. A note given by a general to a special partner, for the capital contributed by the latter, might be void as to creditors, or might make the partnership a general one; but, if given in good faith, would be valid between the parties. (*Beers v. Reynolds*, 12 Barb. 288; affirmed, 1 Kernan, 97.) No principle of law forbids such a contract; nor is it in conflict with any provision of the partnership act. On the contrary, the statute evidently contemplates agreements of this kind, and carefully provides against creditors being prejudiced thereby in the event of insolvency. (Revised Statutes, p. 767, § 23.) This clause has been held to apply to the claim of the special partner against his insolvent firm for his capital. (*Bower v. Argall*, 24 Wendell, 496.)

A. R. Dyett and *L. D. Fredericks*, for defendant, made and argued the following points:—

I. The note, as alleged, was given as security to the plaintiff,

for one half of \$15,000 claimed by him to have been advanced to Davis, Evans & Dodge. The plaintiff proved that this was the consideration of the note. The proof showed that no such money was advanced by Brown to Davis, Evans & Dodge by the plaintiff, but the alleged advance of \$15,000 was by receipting a debt due to the plaintiff from another firm, of which the defendant was a member, and taking a receipt from Davis, Evans & Dodge for \$15,000; the money, in neither receipt, having been paid or received. The firm of Davis, Evans & Co. were insolvent at the time, and the plaintiff was credited on the books of the new firm with \$15,000, whereas he had not advanced any money whatever to them. There was, therefore, no consideration for the note.

II. The note was an illegal contract, and against public policy, and its consideration was also illegal. The plaintiff published to the world that he had contributed this \$15,000 as capital stock to the firm of Davis, Evans & Dodge, without contributing one cent. And in the partnership articles he stipulated to receive seven per cent. on this fictitious advance or capital, whichever it was—and took this note as security, from Davis, for money never advanced, and which he so published to the world was capital, thus drawing away from the funds of the new firm \$1050 a year, instead of aiding them by \$15,000 capital. Indeed the new firm instead of having \$15,000 capital added by plaintiff was, by the arrangement, \$15,000 in debt to the plaintiff, making a difference to the creditors of \$30,000, and making the new firm assume a debt to the plaintiff, without any consideration, to the diminution of its actual assets to that extent, instead of an increase of them, \$15,000. The firm failed for \$30,000, and it was no wonder. This arrangement was a fraud upon the Act, a fraud upon the public, and illegal, (1 R. S. 764, and §§ 1 to 24,) if not actually a misdemeanor, and no action can be sustained upon any contract founded on such an arrangement. (*Perkins v. Savage*, 15 Wend. 412; *Mackie v. Cairns*, 5 Cowen, 547; *Graves v. Delaplaine*, 14 Johns. R. 146; *Burt v. Place*, 6 Cowen, 43; *Payne v. Eden*, 3 Cai. R. 213; *Prince v. Lee*, 4 Johns. 419; *Nellis v. Clark*, 4 Hill, 424; *Mell v. Young*, 23 Wend. 315; *Crooker v. Crane*, 21 Wend. 211; *Bell v. Quin*, 2 Sand. 146.)

III. The \$15,000 was in fact advanced as capital, and at the risk of the business, and the true construction of the indorsement on

the note is, that the note is to secure payment to him of his capital, if not lost in the business.

IV. The action is not brought on the old loan to Davis, Evans & Co., nor on the old notes to them, which were given up; whether the old loan or the old notes were paid, or whether an action might be sustained on the old loan or old notes against the old firm is not a question here. The suit is on a note of Davis. If the suit be brought on the old loan or old notes, it cannot be against Davis alone, but against all the members of the old firm.

V. This note and indorsement was a contract of suretyship. No action would have lain against the firm of Davis, Evans & Dodge, for the recovery of this \$15,000, indeed it cannot be pretended such an action could lie. How, then, can an action be maintained upon a collateral contract, when no action can be maintained upon the principal contract? (*Leavitt v. Palmer*, 3 Comst. 19.)

VI. The judgment should be for the defendant.

BY THE COURT. OAKLEY, CH. J.—This action is brought to recover the amount of a promissory note made by the defendant, dated the 23d of September, 1850, by which he promised to pay on demand, after date, to the order of the plaintiff \$7500, value received.

For two years prior to the date of the note, Evans, Davis and Lownd had been partners. That firm, the name of which was Evans, Davis & Co., owed the plaintiff \$14,069.38, for money advanced to it; that firm dissolved, and the plaintiff surrendered its notes, and took new notes, one of them being the note in question, and another note, in all respects like it, made by Evans.

Upon these facts alone, the only change of liability is this:—The plaintiff relinquished the liability of the firm and the notes made by it, and took for the same claim the individual notes of two members of that firm, viz.: the note of each for half of the amount of the whole claim. Before these notes were given, Davis, as one of the firm of Evans, Davis & Co., was liable for the whole debt. That liability has been converted, as to him, into his individual liability for \$7500.

Is there any thing in the other facts of the case which impairs this liability?

On the date of this note, Davis & Evans, as parties of the first

part, entered into a written agreement with David S. Dodge, as party of the second part, to form a partnership between themselves, under the name of Davis, Evans & Dodge, to continue for the term of ten years. The agreement thus signed, makes them the only parties constituting the firm, and the only persons who were to participate in its profits. The plaintiff, instead of compelling the old firm to pay the money he had lent it, and thus diminish its assets accordingly, agreed to continue the loan, treating it as one made to the new firm, and he was made a creditor of the new firm on its books, to a corresponding amount. Brown agreed that this sum might remain in the new firm "during the continuance of the said copartnership," "he receiving interest for the same at the rate of seven per cent. per annum." The new firm failed within a year after it was formed, and thenceforth ceased to exist, and has paid no part of the principal nor any interest.

Dodge was to contribute, as capital, \$20,000, in three instalments. The theory of the agreement seems to be, that this sum was treated as equivalent to a third interest in the business as it stood, because, without declaring in terms of what the capital of Evans & Davis should consist, it declares that "it is understood that any difference in the amount of capital furnished by either shall be adjusted by interest."

There is no agreement on the part of Brown to look exclusively to the new firm, as his debtor for the \$15,000. He continued the liability of Davis & Evans, by taking the note of each for \$7500. That liability he now seeks to enforce. The indorsement on the back of the note, in connection with the written papers signed by the plaintiff, might be a defence to a suit on the note, if the firm of Evans, Davis & Dodge was continuing. But that firm ceased to exist long before this suit was brought, and was owing some \$30,000 more than it could pay. Brown now seeks to collect his note. Looking at its terms only, it is due; looking at the agreement, as to the time the new firm should have the \$15,000, and the fact that such firm has ceased to exist, it is due.

A party is never bound to prosecute the principal debtor, as a condition precedent to his right to sue the surety, unless such suit is required by the terms of his contract, or necessarily implied from the terms used. (*Morris v. Wadsworth*, 17 Wend. 103.)

It is quite clear, at all events, as between the plaintiff and de-

fendant, that this \$15,000 was not to be at the risk of the success of the new firm. By the terms of the partnership agreement, to which the plaintiff assented by signing it, the \$15,000 "was to remain in the new concern during the continuance of the partnership," and the defendant gave this note to secure to the plaintiff actual payment of one half of that sum. If he put it at risk, as between himself and the firm, he did so only on the terms of having the note of the defendant for half of the amount, and of Evans for the other half. The plaintiff was to have only interest and no profits. The three members of the firm were to have all the profits, and consequently were to bear all the losses.

We think the note is upheld by sufficient consideration, and was due when the action was brought. There is no suggestion that it was not due, if the claim as between the plaintiff and the firm was due. The claim of the plaintiff against the firm was due when the firm ceased to exist as such.

But it is alleged that the note was an illegal contract, and against public policy, and, therefore, no recovery upon it should be permitted. We do not think the facts proved justify the conclusion of any actual fraudulent intent, on the part of the plaintiff. He had, in fact, advanced to the old firm about \$15,000. It was represented by enough of the assets of the new firm to pay it. It was to be continued in the new firm. There is not the slightest reason to suppose that either he or Mr. Dodge supposed there was any ground to doubt the success of the new firm. There is none to suppose that Evans & Davis did, unless it is to be inferred from the fact that the firm failed within a year after it was formed, and that an actual subsequent investigation disclosed that the old firm was insolvent at the time the new one was formed.

Brown was probably gratified with the idea of being advertised as a special partner, who had put in \$15,000 cash; but there is nothing to justify the idea, that it was any part of his purpose to contribute to a credit, with the expectation or belief that it would be the cause of loss to those who might deal with the new firm.

Giving effect to the contract of the parties, as between themselves, will not necessarily tend, of itself, to produce a fraud on the public. It will neither diminish the means which they otherwise might reach, nor impair the remedies to which they otherwise might resort, to collect their demands.

All that was done and advertised did not create a limited partnership, under the statute. Brown may be liable, as a general partner, to all who have dealt with the firm. (1 R. S. 765, § 8.)

But holding Evans & Davis individually liable upon their notes to the plaintiff, will not withdraw from the legal or equitable process of the courts any property that could be reached by a judgment against the general partners, so called, and subsequent proceedings founded upon it. A judgment against the firm, and appropriate ulterior proceedings, will reach all the individual property of each, as well as all the effects of the firm.

This case is unlike an action by one of several creditors, upon a note given to him by a debtor, for an amount beyond his proportion of the amount which each creditor of such debtor had agreed to take, of his claim or demand, and discharges the debtor, in cases where the composition agreement is made upon the representation that all have agreed to come in on equal terms. To allow a recovery in such a case, would operate as a fraud on those who released their own claims for a stipulated percentage on the faith that the creditor, who secretly stipulated for payment of the whole of his claim, had also released his claim on receiving the like percentage.

If the assets of the firm, and the individual property of each, are sufficient to satisfy the creditors of the firm, they will obtain payment. If insufficient, several judgments in favor of one of the firm against two of its members will not diminish their means or chances of obtaining payment.

If the fact had been found by the jury, upon sufficient evidence, or if we ought to hold, as a matter of law, upon the facts found, that it was the design of the parties, by this arrangement, to defraud the public, the court might very properly refuse to enforce any claim of either against the other, founded on such an arrangement. But the plaintiff was not to have, in any event, more than a debt justly his due, and which, for aught that appears, the partners in the old firm were able to pay. This debt, and interest upon it, were all the advantages for which he stipulated. He had no motive, and there is nothing to justify the belief, that he was a party to an actual intent to defraud the public.

The certificate published contains false statements, and as a necessary consequence, the plaintiff may be liable for engagements of

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the firm, and yet he may not have contemplated, and probably did not contemplate, such a contingency, as that the firm should be without means sufficient to pay its debts, as at all likely to occur.

We think the plaintiff should have judgment on the verdict.

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A sale and delivery of property by M. to C. and T., and an agreement by the latter to pay, as part of its price, to E. a sum named, on account of M.'s indebtedness to E., is a valid contract, on which E. can sue in his own name, and recover the sum so agreed to be paid to him.

If, after the consummation of such a sale, by a delivery and acceptance of the property under it, M. executes a formal bill of sale of the property to C. and T. for a pecuniary consideration expressed in the bill of sale, and signs a paper stating that he consents to sell such property for his indebtedness to C. and T., the fact of the subsequent execution of such papers does not render it incompetent for E. to establish by parol the actual agreement under which the property was sold, delivered, and accepted.

The execution of a bill of sale, expressing a pecuniary consideration, and a delivery of it with the property, present no obstacle to showing that such consideration was not wholly pecuniary, but consisted in fact of a special agreement in which E. is interested, and its non-performance to E.'s damage.

Whether, if the executory contract to sell and deliver had been rescinded before it was obligatory on either party to it, and it should appear that the delivery of the goods, and the execution and delivery of the bill of sale, and of the receipt, were cotemporaneous acts, they would preclude the parties to them, or the plaintiff, from showing the agreement to have been such as the complaint states, *quere*.

(Before BOSWORTH and HOFFMAN, J.J.)

March 28, 1858.

THIS action was tried before Mr. Justice Woodruff and a jury, in February, 1856. The complaint was dismissed and the decision excepted to. The question of law arising on that exception, and those arising on exceptions taken during the trial, were directed by the court to be heard, in the first instance, at the General Term.

The complaint states, that plaintiff and defendants are merchants in the city of New York, the defendants comprising the firm of R. E. Crane & Co.

On and before the 1st of September, 1852, Nathan Meyer owed the plaintiff \$1131.63, and owning ready-made clothing and unmanufactured articles, he agreed with the defendants, about that time, to sell and deliver the stock to them, at prices to be thereafter agreed upon, and they agreed to pay therefor as follows, to wit:

1. To pay to plaintiff \$531.63 of the \$1131.63.
2. To pay themselves \$1263.37, the amount due to them from Meyer.
3. To account to Meyer for the balance. Plaintiff was notified of, and acceded to this arrangement, of which the defendants had notice.

That about the 9th of October, 1852, the stock of goods was delivered to the defendants in pursuance of this contract, at prices agreed upon amounting to \$2800. That after satisfying the \$1268.37 due to the defendants, and paying to the plaintiff the \$531.63, there was a balance of \$1000 in defendants' hands, and Meyer's claim for that had been assigned to the plaintiff; that although required to do so, they had not paid that nor the \$581.63, and it prayed judgment for \$1531.63, with interest from the 9th of October, 1852, besides costs of the action.

The answer admitted a sale to the defendants by Meyer, on or about the 9th of October, 1852, but denied that it was under any such agreement as the complaint states, and that any such agreement was made. It averred that Meyer, instead of owing the defendants only \$1268.37, in fact, owed them \$3040.18; that of this \$1407.47 was due to Crane, individually, and that certain of the stock was accepted and transferred to him in gross in satisfaction of that debt; that he also owed R. E. Crane & Co. \$1632.71, and that certain other goods were transferred by Meyer to them, and by them accepted in gross, in satisfaction therefor, and that in each case a bill of sale was executed and delivered by Meyer. On the trial, the indebtedness of Meyer to the plaintiff, in the sum of \$1131.53, was proved by a witness other than Meyer. Meyer was then sworn in behalf of the plaintiff, and testified to the same fact, and that he sold his stock of goods to Crane and Taylor about September, 1852. He said, "the sale was in writing; I made out an invoice of said goods and gave the defendants a copy of it."

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The plaintiff's counsel requested defendants' counsel to produce it, which he did, and plaintiff's counsel then read it in evidence.

It was a formal bill of sale, dated October 9, 1852, from Meyer to Crane and Taylor, for the expressed consideration of \$1632.71, and sold and conveyed absolutely the goods described in the schedule annexed to it. The schedule contained a list of goods, which, at the prices affixed to them, amounted in the aggregate to \$2844.07. At the end of the schedule was a receipt in these words, viz.:

"I do hereby agree and consent to sell to Rufus E. Crane & Co. this stock of goods, of which this is the invoice, for my indebtedness to said Rufus E. Crane & Co." "N. MEYER."

This receipt or writing had no date. The witness, in relation to this invoice or schedule, further testified as follows:

"The goods I have spoken of, which I purchased of Crane & Taylor, the defendants, I returned to them, as I bought them, and they accepted them, and they are not contained in this invoice or bill of parcels."

Question by plaintiff's counsel. "Was any oral agreement made between the plaintiff, Crane & Taylor, and yourself, as to the sale and transfer of your goods to Crane & Taylor, before any bill was made out, and how the consideration was to be paid, and if so, what was the arrangement?" This question was objected to by the counsel for the defendants, and the objection sustained by the court. To which ruling of the court the plaintiff's counsel then and there duly excepted.

"Did you, after this paper was executed on the 9th day of October, 1852, owe Crane & Taylor any thing?" Objected to by the defendants' counsel, and then withdrawn by the counsel for the plaintiff.

"Before any papers were delivered to Crane & Taylor was any arrangement made by which you sold them your stock of goods and they agreed to pay Mr. Earle any sum of money?" The defendants' counsel objected to the question, on the ground, among others, that the arrangement made was in writing. The court sustained the objection. To which ruling of the court the plaintiff's counsel then and there duly excepted.

"You sold to Crane & Taylor your stock in trade?" "Yes."

"At what price?" The defendants' counsel objected to the

question. The court sustained the objection. To which ruling of the court the plaintiff's counsel then and there duly excepted.

"Were the goods put at cost, above cost, or below cost?" Similar objection, ruling and exception.

"How was the consideration to be paid by Crane & Taylor on that sale?" Similar objection, ruling and exception as above.

"Were they or were they not sold before the 9th of October, 1852, and delivered on an agreement between the plaintiff and defendants and yourself, that they (defendants) were to pay the plaintiff any, and if so what sum of money?" Similar objection, ruling and exception as above.

"On the 9th of October, 1852, did you owe the firm of Crane & Taylor any thing, and if so what?" Similar objection, ruling and exception as above.

"Did you, or did you not, return to Crane & Taylor, and they accept the goods bought by you of them, and rescind the contract of indebtedness to them after the bill of parcels of the 9th of October, 1852, by which all your indebtedness to them was cancelled?" Similar objection, ruling and exception as above.

"Does this bill of parcels or invoice contain the goods that you bought of Crane & Taylor, and which you subsequently returned to them?" "No, sir. There is not a single article there I returned to them, and they rescinded the contract."

"Had Crane & Taylor any other indebtedness against you after the 9th of October, 1852, after returning those goods?" Question objected to by the defendants' counsel on the ground, among others, that the complaint itself admits an indebtedness at the time of the transfer.

The plaintiff's counsel now moved the court to be permitted to amend the complaint by striking out the name of "Co." after the word Crane.

The defendants' counsel objecting to the motion, the court sustained the objection, and denied the motion to amend.

The plaintiff's counsel here introduced and gave in evidence the following transfer from the witness to the plaintiff.

"Whereas, Rufus E. Crane & Co., heretofore purchased from me a quantity of merchandise, consisting of ready-made woollen clothing, etc., for the sum of \$2,900, or thereabouts; and whereas, the said Crane & Co. did then and there agree to pay for the same

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in manner following, viz.: First, to pay to John E. Earle, of the city of New York, \$531.63; secondly, to deduct the sum of about \$1,400 for their own claim, or debt; and lastly, to pay the remaining balance to me, or my order, and which said balance would amount to about \$968.

"Now know ye that I, Nathan Meyer, in consideration of one dollar to me, in hand paid by John E. Earle, and for divers other good considerations, do hereby assign and set over to the said Earle the said remaining balance. First, to pay himself the sum of about \$600 due to him from N. & M. Meyer, (independent of the sum of \$531.63,) and to pay over to me, or my assigns, the residue of said remaining sum, after the payment of the aforesaid sum of money.

"N. MEYER. [L. S.]

"Dated, New York, March 7, 1853."

And also another transfer to Rachael Smith, as follows:

"In consideration of one dollar to me, in hand paid, and for divers other considerations, I hereby assign and set over to Rachael Smith, of the city of New York, any and every sum of money that shall or may be coming to me from John E. Earle, of the said city, by reason of a certain assignment made and executed to him, by me, on the 7th of March instant, of a claim or demand of mine against Rufus E. Crane & Co., of the city of New York, more particularly mentioned and described in said referred to assignment. This assignment is intended to embrace only what shall be coming to me after the payment of the amount due said Earle, as provided therein.

"N. MEYER. [L. S.]

"Dated, March 8, 1853."

The defendants' counsel thereupon moved the court to dismiss the plaintiffs' complaint.

The plaintiff's counsel opposed the motion, but the court sustained the same, and dismissed the complaint, with leave to the plaintiff to move the court, if so advised, to amend the complaint, and on such amendment being granted, to set aside dismissal: and to the decision of the court, in so dismissing the complaint, the plaintiff's counsel then and there duly excepted.

And inasmuch as the said several matters so given in evidence,

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and the objections, offers, decisions, refusals, and exceptions, on the part of the plaintiff, do not appear by the record of the trial aforesaid, the counsel for the plaintiff did thereupon request his honor, the said Justice, to sign this case upon exceptions, containing the matters aforesaid, according to the statute in such case made and provided, which is accordingly done, the said 20th day of February, 1856.

It was further ordered, that the exceptions taken be heard, in the first instance, at the General Term.

Jas. W. Gerard, for plaintiff.

R. M. Harrington, for defendants.

BY THE COURT. BOSWORTH, J.—Proof of such an agreement as is stated in the complaint, and of full execution of it, on the part of Meyer, standing alone, would entitle the plaintiff to recover the \$531⁶³/₁₀₀. The plaintiff could sue on such a promise, in his own name, although not a party to the agreement, by being present and participating in the making of it, and such an agreement is not affected by the statute of frauds. (*Barker v. Bucklin*, 2 Denio, 45, and cases there cited.)

Notwithstanding that Meyer testified that "the sale was in writing," and that the papers shown to him were executed by him, and delivered to the defendants, the plaintiff should not, for that cause, have been stopped short in his examination of the witness, and precluded from showing, if he could, that such an agreement was made in September, 1852, as the complaint states, and the delivery of the goods to, and an acceptance of them by the defendants, pursuant to, and in execution of, such agreement. We think that answers, naturally and fairly responsive to some of the questions put by plaintiff's counsel, and excluded by the court, might have proved such an agreement and its consummation. We are not at liberty to say, that if the witness had been permitted to answer, he would have failed to give such evidence. We must presume those questions were put with a view to prove the plaintiff's cause of action; and as responsive answers might have established it, the refusal of the court to allow the witness to answer was erroneous.

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If the agreement alleged in the complaint was made, and Meyer delivered, and the defendants accepted the goods in pursuance of it, the plaintiff is entitled to recover the \$531⁷³/₁₀₀, although subsequent to the delivery and acceptance of the goods Meyer executed the papers, which were produced and exhibited to him on his examination at the trial.

An agreement between Meyer and the defendants, such as the complaint avers was made in September, 1852, would not preclude them, before any thing had been done under it to make it obligatory upon the parties to it, and which would have created a right of action by reason of it, in favor of the plaintiff against the defendants, from annulling or abandoning the agreement, and making a new one upon such terms as they might think proper.

If it should turn out that they subsequently made a different agreement, under which the goods were delivered and accepted, and that it was no part of that agreement that the defendants should pay to the plaintiff the debt which Meyer owed the plaintiff, the plaintiff could not recover in this action.

Even if such agreement was a fraud upon the creditors of Meyer, and was made with intent to defraud them, the plaintiff, as a creditor at large of Meyer, could not assail it in this action. (*Reubens v Joel*, 3 Kern. 488.)

But the plaintiff may show, if he can, such an agreement as is stated in the complaint, and the delivery by Meyer, and the acceptance by the defendants of the goods, in execution of it, before the bill of sale of the 9th of October, 1852, was executed and delivered. If, after such a delivery and acceptance of the goods, in execution of such an agreement, that bill of sale, and the receipt annexed to the invoice, were executed, it should not affect the plaintiff's right to recover.

The bill of sale, of itself, and standing alone, would be no obstacle to the reception of parol evidence to prove what price the defendants agreed to pay for the goods, or the manner in which, or the persons to whom, they promised Meyer they would pay it (*Murray v. Smith*, 1 Duer, 412. Affirmed as to those points in the Court of Appeals.)

But if there was no agreement concluded before the goods were delivered and accepted, or if one had been made in form, but before any thing had been done to execute it, by either party to it,

it was modified, and all previous conversations or understandings ended by accompanying the delivery of the goods with a delivery of the bill of sale, and the receipt, so called, which is annexed to the invoice, a different question may be presented.

A mere receipt is, undoubtedly, susceptible of explanation by parol evidence, as to the nature or payment of the consideration stated in it, when such proof does not prevent the instrument from operating to pass a title, or to give effect to the transfer as a transfer. But when a receipt also contains clauses of contract, the latter are no more subject to be varied by parol evidence than any other written contract. (*Kellogg v. Richards*, 14 Wend. 116; *Coon v. Knap*, 4 Seld. 402; *vide Noel v. Murray*, 3 Kern. 167.)

The receipt in question imports that Mr. Meyer was indebted to Rufus E. Crane & Co., and agreed and consented to sell the goods, to the invoice of which it is appended, in satisfaction of his indebtedness to them. It does not state, in terms, that they agreed and consented to accept them in satisfaction of such indebtedness, nor that such satisfaction was the whole consideration of such transfer. Their acceptance of the goods, with that paper annexed, may import, and is, undoubtedly, evidence that they accepted them on those terms.

Whether, if they were plaintiffs in an action against Meyer to recover an alleged balance, which the proceeds of the goods were insufficient to pay, or to recover the indebtedness mentioned in the receipt, proof of the delivery of the goods, and that the invoice and this receipt accompanied such delivery, without proving more, would preclude them from showing that they did not accept, nor agree to accept, them in full payment, may be a somewhat different question from any one settled by either of the three cases last cited.

In *Kellogg v. Richards* and *Coon v. Knap*, *supra*, the plaintiff's receipt, which was produced in bar of the plaintiff's action, stated in the first case, the receipt of a note made by a third person, "as a compromise for the full payment," and in the latter, of a specific sum, "in full for damages done to us by the stage accident," or, in other words, of the plaintiff's cause of action. The court held these clauses to be clauses of contract, and not capable of being varied by parol evidence. In the present case, no paper writing, signed by the defendants, was shown which evidenced any agree-

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ment on their part. The acceptance of the bill of parcels, with the receipt annexed, is, undoubtedly, evidence against them that they accepted the goods on the terms stated in the receipt. But do those facts alone estop them from showing to the contrary?

In *Noel v. Murray*, (1 Duer, 385, and 3 Kern. 167,) the receipt of the plaintiff stated that the note of a third person and a sum of money were "received in full for the above bill," the amount of which bill that suit was brought to recover. In the latter case, a verdict was taken in this court for the plaintiff, subject to the opinion of the court upon a case containing the whole evidence. This court gave judgment against the defendant; and in the opinion delivered, the question was suggested, but not decided, whether such a receipt ought not to be deemed to conclude the defendant. That action went to the Court of Appeals after the case had been turned into a bill of exceptions, according to which it was submitted to the jury for them to determine, as a question of fact, whether the note was received as actual payment and satisfaction, and they found that it was.

The Court of Appeals do not intimate or suggest the idea that the receipt was conclusive, although they held, on the facts of the case, that there was no valid debt existing against the defendant prior to the day on which the receipt bore date, and that, independent of any thing contained in the receipt, the legal presumption was, that the note was received in payment. Whether the plaintiff is estopped from showing that the receipt, so called, does not state the actual agreement between Meyer and the defendants, even if it would be conclusive as between the latter, except in an action by one of them against the other, to set it aside for fraud or clear mistake, it is unnecessary to decide. That question does not now arise, and may not, on another trial.

It is sufficient to say, that the plaintiff is not a party to that paper, nor to the bill of sale of the 9th of October. He does not claim under those papers, nor under any agreement made on the day of their date, or at the time of their delivery.

A written agreement concludes the parties to it, and privies, but not strangers. (*Whitbeck v. Whitbeck*, 9 Cowen, 263-270.)

Whether the evidence which may be given on another trial will place the plaintiff in the position of a privy to these contracts cannot now be foreseen.

Nor are we, now, at liberty to pass upon the question, whether, if it should appear that the delivery of the goods by Meyer to the defendants was accompanied by the bill of sale and the receipt, both of those parties, as between themselves, would be concluded from showing by parol, that the consideration was different in its nature from, or larger than that named in, either the bill of sale or the receipt? In the bill of sale it is stated to be \$1632⁷⁴/₁₀₀ lawful money. In the receipt it is stated that Meyer consents and agrees to sell the goods to Rufus E. Crane & Co., for his indebtedness to them.

Construing the two together, it is not an unnatural construction of the receipt, to read it as declaring that such indebtedness is treated by both parties as money paid to Meyer, to the extent of its amount. Nor would proof, that such indebtedness, in the contemplation and agreement of the parties, consisted, in part, of the sum owing by Meyer to the plaintiffs, and which the defendants had assumed to pay, be necessarily in conflict with the meaning of the terms of the receipt.

In *Murray v. Smith*, when before the Court of Appeals, Gardiner, J., said, that, *prima facie*, the consideration was such as the deed stated, and payment of it had been made, as the deed declared. Still it was competent for the plaintiff to prove that it had not been paid; that the sum was greater or less than the deed declared, or that it was not pecuniary, in whole or in part.

That if a special agreement constitutes a part of the consideration, that agreement and a breach of it might be shown, whether it was an agreement to pay money to the plaintiff or to Powers, the mortgagee, or whether it was an agreement to indemnify the plaintiff against half of that incumbrance.

In other words, when proof of the agreement as alleged, will not prevent the bill of sale or instrument of transfer from being effective as such to pass a title, and such agreement, in fact, forms part of the actual consideration, the plaintiff may prove it if he is the party damnified by non-performance of it, and there is nothing in the clause relating to the consideration so conclusive upon the parties as to render such proof inadmissible.

When the facts are fully developed, the court must judge whether they present a case falling within this rule, or one falling

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within the prohibition against varying or enlarging the terms, or clear legal import of a written contract by parol evidence.

We grant a new trial on the ground that it was competent for the plaintiff to prove, if he could, the contract between Meyer and the defendants set out in the complaint, and the delivery of the goods by Meyer to the defendants, and an acceptance of the goods by the latter pursuant to, and in execution of, that contract.

We think the plaintiff was precluded from giving such evidence by the decision, that the questions put to the witness, Meyer, could not be allowed to be answered by him.

A new trial must be granted, with costs to abide the event.

**WILLIAM R. MCCREEDY v. JOHN V. RUMSEY, President of the
Suffolk Bank.**

The plaintiff was an assignee, for value, of a certificate for twenty shares of the capital stock of the defendant's bank. The certificate was in the name of one Jenkins, and the shares stood in his name upon the books of the bank. The plaintiff demanded a transfer of the shares to himself, and a new certificate in his own name therefor. The president of the association refused to make the transfer, alledging that Jenkins' original subscription for the shares was unpaid, and the plaintiff brought this action to recover damages for such refusal.

Held, that the plaintiff, as an assignee, had no other rights than would have belonged to Jenkins had he not parted with his certificate, and that by the true construction of section 19 in the general banking act, (1838,) and of the provisions in the bank's articles of association, he had no right to demand a transfer of the shares without paying to the bank the sum then due from Jenkins thereon.

Held, therefore, that the refusal of the president to make the transfer demanded was justifiable, and furnished no ground of action to the plaintiff for the recovery of damages.

Judgment ordered for the defendants, with costs.

(Before OAKLEY, CH. J., BOSWORTH and HOFFMAN, J.J.)

February 24; March 28, 1857.

A VERDICT was taken, in this case, by consent of the plaintiff, subject to the opinion of the court at General Term, on the questions of law arising in the case, and which were directed to be there argued in the first instance, the court to be at liberty, at the General Term, to direct a verdict to be entered for the defendants,

if they deemed that result just, and the plaintiff to be at liberty to except thereto. Either party may turn the case into a bill of exceptions or special verdict. The cause was tried before Bosworth, J., and a jury, in January, 1857, and the following are the material facts proved on the trial:—

In December, 1852, the plaintiff, for a valuable consideration, purchased of one Chandor, twenty shares of the capital stock of the Suffolk Bank, a corporation organized under the general banking law of 1838.

Chandor, at the time of such purchase, executed to him a written assignment of said stock, which he indorsed on the back of the scrip or certificate of the same. The certificate was in the following form:—

“(Seal.)

“STATE OF NEW YORK.

“TWENTY SHARES.

“Be it known, that E. F. Jenkins, Esquire, is the proprietor of twenty shares of the capital stock of the Suffolk Bank, which is transferable only on the books of the bank by the said E. F. Jenkins, or his attorney, on the surrender of this certificate.

“NEW YORK, 9th August, 1852.

“WM. E. ARNOLD, President.

“HENRY E. CUNLIP, Cashier, *pro tem.*”

This stock had been purchased by Chandor, of E. F. Jenkins, on the 9th day of December, 1852. It then stood on the books of the bank in the name of said Jenkins, who, on that day executed an assignment thereof to said Chandor, coupled with a power of attorney in the usual form, authorizing him to transfer the same, etc.

This assignment and power of attorney was annexed to the scrip or certificate which the bank had issued to the said Jenkins for the said stock on the 9th of August, 1852.

In February or March, 1853, Chandor went to the bank with Mr. Wright, plaintiff's attorney, and tendered to the president the said certificate, with the assignment, etc., annexed, to be surrendered and cancelled, and both Mr. Wright, on behalf of the plaintiff, and Mr. Chandor demanded that the stock should be transferred to the plaintiff.

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The president refused to permit the stock to be transferred, assigning as a reason, that Jenkins had not paid up to the bank his subscription for the stock.

Jenkins was the original subscriber for this stock, and had subscribed for one hundred shares, par value \$5000, on the 30th of July, 1852, of which this stock was part.

The by-laws of the bank authorize the bank to sell the shares of any shareholder to pay any debt then due, and provide that no shareholder shall be permitted to transfer his shares while any debt which had become due shall remain unpaid. That every transfer, to be valid, shall be made on the books, and signed by the shareholder or his attorney, duly authorized in writing.

That no share shall be transferable on which any call for installment of capital, or interest on such installment, shall remain unpaid, and that every transfer shall be made and taken subject to the conditions and stipulations of the by-laws.

It does not appear that Chandor or the plaintiff had any actual notice of these provisions.

Jenkins paid for his subscription by his own notes, which were due and unpaid at the time of the plaintiff's demand at the bank.

He afterwards renewed them at the request of the bank, and the bank made him a discount in addition of \$2000, which was also included in the renewed notes.

The renewed notes were not paid.

No question arises as to the value of the stock.

Mr. Hardenbrook, for the plaintiff.

Mr. Phelps, for the defendants.

HOFFMAN, J.—The first and most important question thus arises. The defendants have a valid lien upon the stock in question as against Jenkins, the original subscriber, by reason of the non-payment of the notes given upon his subscription. They had issued to Jenkins a certificate stating "that he was the proprietor of such shares, which are transferable only on the books of the bank, by the said E. F. Jenkins or his attorney, on surrender of this certificate." This certificate has come to the hands of the present plaintiff, for valuable consideration, by successive trans-

fers. He demands a transfer of the stock on the books of the company. It is refused, because of the lien claimed to exist. Can the assignee of the certificate sustain a claim which Jenkins, the assignor, could not do?

The lien of the company is thus created:

The defendants were organized as a corporation under the general banking act of 1838. The articles are in evidence, and are very explicit as to the existence and enforcement of the lien.

These were embodied in the certificate recorded and filed pursuant to the sixteenth section of the act. But this court has decided in this case, when previously before it, that the record was constructive notice only of what the statute prescribes must be contained in the certificate. None of the clauses of the articles now referred to are among those specified in the sixteenth section as necessary to be contained in the certificate.

But the nineteenth section of the act provides that the shares shall be deemed personal property, and shall be transferable on the books of the association, in such manner as may be agreed on in the articles of association; and every person becoming a shareholder by such transfer shall, in proportion to his share, succeed to all the rights and liabilities of prior shareholders.

The articles of association, in the present case, prescribe that the association may sell the shares of any debtor stockholder, that no shareholder shall be permitted to transfer his shares or receive a dividend thereon, who shall owe a debt to the association, until it be paid, and that no share shall be transferable on which any call for any installment of capital, or any interest on such installment, shall remain unpaid. And every transfer shall be made and taken expressly subject to all the conditions and stipulations contained in the articles.

Now the question is, whether the general act is not a constructive notice to an assignee of a certificate that it can only give to him the same rights as were possessed by the party in whose favor it was issued? He is to succeed to these rights and liabilities. The transfer is to be made on the books, as may be agreed upon in the articles. The liability for an unpaid subscription is declared in the articles.

Stebbins v. The Phoenix Fire Insurance Company (3 Paige, 350) was cited by the plaintiff's counsel. Certain stock belonged to

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Charles Mowatt, and was transferred by him on the books to one James Donaldson, a mere fictitious person, to enable him to be placed on the list of directors. A certificate was issued in the usual form, signed by the president and secretary, stating that Donaldson was the owner of such shares of stock, transferable only on the books of the company. Mowatt appropriated the corporate funds to his own use. He afterwards found a person of the name of James Donaldson, and obtained from him an assignment and power of attorney in blank. Being indebted to the Chemical Company, of which the plaintiff was cashier, he filled up the blanks with his name and delivered the certificate and powers to him as security for such debt. The bill was to compel a transfer. The defendants insisted upon their lien.

Vice-Chancellor McCoun held, 1st, That the lien could not be created by the by-laws, but was created by the statute granting the charter, and by that only. 2d, That lien must exist against a stockholder. 3d, Donaldson, and not Mowatt, was the stockholder. The company had vested the title in him by the certificate and entering his name on the books as the owner. (*Kane v. Bloodgood*, 7 John. Ch. Rep. 108.) 4th, The equities between Donaldson and Mowatt, if there were any on such a transaction, were of no consequence as related to the plaintiff being a *bona fide* holder of the certificate. He was not such a holder, although he took the transfer for an antecedent debt. The plaintiff was entitled to a decree for an absolute transfer of the stock.

On appeal, the Chancellor held, 1st, That though the by-law created no lien, yet, as the possession of the certificate did not give a legal title which would only pass by the transfer on the books, a purchaser without such transfer would take, subject to any equitable claim of the company or others upon the stock. The by-law made a transfer necessary to pass the legal title. Without it a *bona fide* assignee of the certificate would have taken it free of any lien of the company. 2d, The company had a legal and equitable lien upon the stock, under the eighth section of the charter. (That was very explicit in declaring it.) 3d, The transfer to Donaldson was a mere nullity, and the ownership of the stock never passed to Mowatt; but of this the officers were aware. If the plaintiff had, therefore, actually advanced money on the assignment to them, he was inclined to think they could have

prevailed against the company's lien. But an assignment for securing an antecedent debt conferred no such superior equity. 4th, The lien existed upon all stock standing in the name of a stockholder, or in that of a trustee for him.

The right of the defendants to the lien was declared; the complainant was allowed to redeem the stock.

The intimation of the Chancellor as to the rights of the parties, had money been advanced, appears to rest upon this, that the directors had connived in issuing a certificate declaring Donaldson to be a holder, against whom they had, in fact, no claim. The present case is free from any such difficulty.

I apprehend that the right of the defendants to this lien in the present case would be sustained upon the doctrine of either the Vice-Chancellor or the Chancellor, provided a lien were constituted by statutory law.

This, then, is the inquiry, I think, and that proposition is not contested, that the articles of association gave the lien as against Jenkins. The stock, so long as it stood in his name, was liable for the demand. The assignee takes, as his successor, and by the statute takes with the same rights and liabilities.

It has not escaped my notice that the language admits of the construction, that the assignee is to be responsible only for personal liabilities of his assignor, for example, to creditors. It can scarcely be claimed that a personal liability would arise for the unpaid subscription-money. (But, then, the transferee succeeds to the rights of the transferror. He cannot succeed to greater rights; and rights certainly contemplate the relation with the company as well as with others.

The case of *Bates v. The New York Insurance Company*, (3 John. Com. 238,) is in point upon this question. By articles of association of the company, no transfer of any share was to be valid or permitted until all the instalments on the shares were paid. An assignment of a shareholder's stock had been made to the plaintiff, and notice given on the 20th of January, 1797. It was held, that the company had a right to retain all dividends until the debt of the assignor, actually due at the time of the notice, had been satisfied. The court declined to pass upon the question as to what the defendants' rights would have been if the note held by the company had not been due.

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The New York Insurance Company was incorporated by an act of the 2d of April, 1798, and it recites that Archibald Gracie, and others, had associated as a company, under the same title. I am informed by the present counsel of the company, Mr. Justice Emmet, that they were associated in 1796, and got their charter in 1798, after the stock had been fully paid up.

The counsel for the defendants insists that the case of *The Mechanics' Bank v. The New York and New Haven R. R. Co.* (3 Kernan, 600,) is decisive. Undoubtedly, it goes far, if not fully, to establish the position, that transfers of certificates confer nothing beyond the title of the assignor. The rule thus stated is, I think, particularly applicable, and particularly clear, where the company has a valid lien upon the stock for an undoubted demand. At least, it is more apparent to my mind, that where, as in that case, there was, in the judgment of the court below, room to treat the company as debarred from a defence by reason of its acts, through agents presumptively authorized.

I think a judgment in favor of the defendants should be ordered.

BOSWORTH, J.—This action is brought against Mr. Rumsey, as president of a bank, organized under the general banking law of 1838.

The 19th section of that act declares that the shares of stock "shall be transferable on the books of the association in such manner as may be agreed on in the articles of association." (1 R. S., 4th ed., 1147.)

Sections 2 and 3 of article II., and sections 1, 2, 3, and 4 of article V. of the articles of association, are valid, and as efficient as if forming parts of a special charter.

As between the bank and Jenkins, the former, by force of the articles of association, to which the latter was a party, had a lien on this stock, as security for the notes given for the stock subscription, and had a right to sell the stock to obtain payment of the notes.

The plaintiff has not obtained, as yet, a legal title to the stock. To obtain that, a transfer must be made on the books of the association, signed by the shareholder or his duly authorized attorney in writing. Unless by a transfer made in a different manner, the assignee of a certificate can acquire rights and equities against the

corporation superior to those which the assignor had, the defendant may assert its lien upon the stock, as against the plaintiff, precisely as it could have done against Jenkins.

The opinion of the Court of Appeals in *The Mechanics' Bank v. The N. Y. & New Haven Railroad Co.*, (3 Kern. 599 & 623-629,) is explicit in asserting the proposition, that an outside transfer of a certificate will confer upon the assignee, merely, such rights as his assignor possessed. The proposition is argued at great length, and its soundness is so often and directly declared, that we are not at liberty to regard it as an *obiter dictum*.

Applying that rule to the facts of this case, the complaint should be dismissed, unless the plaintiff elects to have a transfer of the stock upon the books of the company, upon the terms of satisfying the incumbrances which are a lien upon it.

Independent of the decision made in *The Mechanics' Bank v. The New York & New Haven Railroad Co.*, it is not clear that the lien of the defendants could be asserted, even if it be conceded that its rights are not weaker than they would have been if the bank was incorporated by a special act containing the provisions found in the articles of association of the present defendants. The plaintiff is a purchaser for value, without notice of the equitable lien of the defendants.

— The Chancellor, in *Stebbins v. Phoenix Fire Ins. Co.*, (3 Paige, 350-362,) intimated the opinion, that "the defendant could not be permitted to enforce that lien against *bona fide* purchasers of the stock who had no notice of such equitable lien," but it was unnecessary to the decision of that case, to consider that question. The charter of that company contained a provision in effect like section 4 of article II. of the defendants' articles of association.

The Chancellor's dictum is not necessarily opposed to the decision made in *The Union Bank v. Laird*, (2 Wheaton, 390.) In the latter case, Laird took the transfer as security against a pre-existing liability; he was not, therefore, a purchaser for value paid for the certificate, and on the faith thereof.

In *Bates v. The New York Ins. Co.*, (3 J. C. 238,) the decision was put on the ground, that all stock dividends declared before the company was notified of the transfer of the stock, being money in its hands, it might equitably apply upon a debt actually due and owing by the person who held the legal title on the books

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of the company ; but that on the stock being paid for in full by the purchaser, the company could not refuse a transfer, until it was paid the whole sum owing to it by the shareholder having the legal title at the time the transfer was demanded. The purchaser having been compelled to pay the debt owing by such person to the company, in order to obtain a transfer of the stock to himself on the books of the company, he was allowed to recover the money back in action for money had and received.

When there is nothing in the terms of a certificate to indicate that the stock has not been fully paid for, and an outside purchaser of the certificate has no notice that it has not been paid for, it is difficult to perceive why he should be any more affected by a lien created by the articles of association, than by a lien created by a special agreement between the parties for an unpaid note, which has been discounted in the ordinary course of business. (Vide *Bank of Utica v. Smalley*, 2 Cowen, 770, 778; *Gilbert v. Manchester Iron Manufacturing Co.*, 11 Wend. 627.)

In *The Mechanics' Bank v. The New York & New Haven Railroad Co.*, (3 Kern. 629,) the court said, that before an assignment of a stock certificate could be admitted to confer on the assignee a better title than the assignor had, "it must be shown to have not only all the negotiable qualities of a bill of lading, but others also which that instrument does not possess."

"It is mainly by assuming for these instruments the possession, in a greater or less degree, of the peculiar qualities of negotiable securities, that the plaintiffs claim to have acquired by transfer better rights than their assignor had ; and as that assumption fails, this claim must fall to the ground."—*Id.*

"While it may be the effect of a stock certificate to give to the holder a credit, its terms do not request, invite, or guarantee it"—*Id.* 630.

"But to say, that like a letter of credit, . . . it contains any assurance or guarantee addressed to the dealer, of the safety of the transaction, is, in my judgment, to confound plain and long-settled distinctions."—*Id.* 630, 631.

We think it quite clear, that the Court of Appeals meant to decide, and to be understood as deciding, that an assignee of a certificate could not thereby acquire any rights against the corporation superior to those possessed by the assignor. That he was to be

deemed an assignee of a thing in action not negotiable, and as succeeding merely to the rights and equities of the assignors. Applying that rule to this case, the complaint should be dismissed. (See 1 R. S., 4th ed., p. 1147, § 170, and id. 1152, § 196.)

Under the stipulation made at the trial, and contained in the case, judgment should be entered for the defendants.

OAKLEY, CH. J., concurred in the result, and in giving judgment for the defendants, on the grounds stated in the opinion of Bosworth, J.

THE ATLANTIC FIRE AND MARINE INSURANCE CO. v. ETHAN E. BOIES, impleaded with JOHN H. WASHBURN and CURTIS L. NORTH.

The law presumes that the acceptor of a bill of exchange has funds of the drawer in his hands, and in an action against the acceptor, the burden of disproving the presumption rests upon him. When the presumption is not repelled, the drawer of the bill stands in the same relation to the acceptor as the indorser of a promissory note to the maker. The acceptor is the principal debtor, the drawer his surety merely.

In such a case, the extension to the drawer of the time of payment does not operate to discharge the acceptor.

The question whether a negotiable or other security was received by the holder of the bill as a payment, or merely as a collateral, when there is a conflict of evidence, is for the determination of the jury, and their verdict, when it cannot be set aside as contrary to evidence, is conclusive. When a promissory note, received by the holder of the bill as a collateral security, is not that of a third party, but of one already liable on the bill, it cannot be treated as a pledge, and hence the rules of law relative to the disposition of a pledge are not applicable.

(Before HOFFMAN, SLOSSON and WOODRUFF, J.J.)

Jan. 19; March 21, 1857.

CASE upon a verdict for plaintiff taken subject to the opinion of the court at General Term, upon questions of law. Judgment in the mean time suspended.

The action was upon a bill of exchange for \$6000, against North as the drawer, and Washburn and Boies as the acceptors. Boies answered separately, and set up payment as a defence, and it was against him alone that the cause was tried.

It was tried before Oakley, Ch. J., and a jury, in November, 1855.

The following are the material facts established by the evidence upon the trial, and raising the questions of law reserved for the determination of the court at General Term :—

The plaintiffs are an incorporated company in Providence, Rhode Island, and gave full value for the draft to North, from whom they received it.

Washburn and Boies were a firm in New York. The acceptance is in the handwriting of Boies. At the same time Washburn and Boies had funds of North, and continued to pay them out until the latter ceased to supply them.

Whether they were actually in funds at the time of this acceptance does not appear. At the time it was given, nothing was said to the plaintiffs by North about his having funds in the hands of Washburn and Boies. Stevens, the secretary of the company, says, he supposed he would provide money to pay the draft, or he would not have let him have the advance.

When the draft fell due, it was not paid. The secretary of the plaintiffs, (Stevens,) went to Meriden, where North resided, taking with him the draft, to see North, and arrange it. Boies was there, and they arranged the matter by Boies transferring to Stevens, as collateral security for the debt, the note of North, with his own indorsement for the exact amount of the draft, with interest added for the time the note had to run, which was two months, and as collateral to the note North transferred shares in the North Avery Sewing Machine Company, at the par value of \$6000.

The plaintiffs never did any thing with this stock, and of course still hold it. The plaintiffs retained possession of the draft. When the note fell due it was not paid, and suit was immediately commenced upon it in the Superior Court. Boies put in an answer to the complaint, denying that his indorsement was for value, denying notice of protest, and claiming that the Avery Sewing Machine Company stock should be applied in extinguishment of the note.

About a month after the commencement of the suit, it was settled by the plaintiffs with North. The settlement was effected by North transferring to the plaintiffs the acceptance of one Wilbur, not then due, for, deducting interest, \$2733.94; the ac-

ceptance of one Wilbur, not then due, for, deducting interest, \$2785.75; the note of E. J. Collins, not then due, for, deducting interest, \$685.31.

Interest and expenses were added to the amount of the \$6060 note, and the aggregate was the exact amount of the above two acceptances and note. The \$6060 note was then surrendered to North.

At this settlement neither Boies nor Washburn were present, nor had they any thing to do with it, nor were their names in the new paper.

Both these acceptances, and the Collins note, were turned over by plaintiffs in payment of losses for which they were liable, but the plaintiffs indorsed the paper.

The Wilbur acceptance, not being paid, was renewed by the plaintiffs drawing on North for the amount, with interest, at two months, in favor of the party to whom it had been transferred in payment, but was not paid at maturity, and the plaintiffs took it up. The Wilbur acceptance was not paid at maturity, and the plaintiffs also took that up as indorsers. The Collins note was paid at maturity.

From this it appears that not only the note of \$6060 but the two acceptances and the Collins notes were taken as collateral security for the original debt as sworn to by Stevens.

Since these transactions, it was proved Boies had frequently promised the plaintiffs, in conversation with Stevens, to pay the debt.

E. Seeley, for the plaintiffs, moved for judgment upon the verdict.

J. Sutherland, for the defendant.

He cited *Wilson v. Little* (2 Comst. 443); *Nourse v. Borne* (4 John. Ch. R. 490, and 7 John. Ch. R. 69); *Stearns v. Marsh* (4 Denio, 227); *Dikers v. Alstyne* (1 Hill, 497), and some other cases.

The only question of fact left to the jury was, whether the \$6060 note was taken in payment of the original debt, (the one in suit,) and they were instructed, if they found it was not so taken, to give a verdict for the plaintiffs, which they did in the sum of \$6056.62.

BY THE COURT. SLOSSON, J.—The presumption is that the acceptance in question was made upon funds of the drawer in the hands of Boies & Washburn, it being usual to draw upon funds in hand or their equivalent, and I find nothing in the evidence to disturb this presumption, but, on the contrary, much to support it. These defendants are, therefore, not only primarily liable according to the face of the contract, but are, in fact, the principal debtors as to all the parties. As a general rule, nothing will discharge an acceptor of a bill, but payment or a release.

The note of \$6060 was not received in payment, but as collateral merely. The finding of the jury settles this question.

The securities received in settlement of the suit on this note were also all received as collateral to the principal debt, and with the exception of the Collins note have realized nothing to the plaintiffs. Boies & Washburn have lost nothing by the use made of these collaterals by the plaintiffs. They were received from North, the drawer of the original bill, and who, as respects the other defendants, stands in the position of surety merely. Giving time to the surety does not discharge the principal.

Moreover, the plaintiffs had ultimately to take up these securities, having indorsed them when they used them in payment. It is true the \$6060 note was given up to North on the receipt of these latter securities, but this of itself is not conclusive that they were received in payment of the debt. On the contrary, the evidence of Stevens is explicit and not contradicted, that they were received as collateral merely. It was a substitution of one security for another for the same debt.

But the defendant contends that the note of \$6060 was in the nature of a pledge in the hands of the plaintiffs, and that they had no right to give up the note to North except on its payment, and that having done so, without the knowledge or consent of Boies and Washburn, the note is, as respects the latter, to be treated as paid.

The general rule as to pledges, which are always collateral, is, that the creditor cannot sell the property without calling on the debtor to redeem or to pay the debt, and also giving him notice of the time and place of sale, unless in case of a special agreement to the contrary. If the pledge consist of commercial paper, the creditor must hold it until maturity, and collect and apply the

proceeds in payment of the debt. (*Garush v. James*, 12 J. R. 146; *Wilson v. Little*, 2 Com. 443; *Dykers v. Allen*, 7 Hill, 497; *Stearns v. Marsh*, 5 Denio, 227; *Brown v. Ward*, 3 Duer, 660.)

The objection to the theory of this being a pledge is, that the note in question is not that of a third party, but is made by the parties already liable for the original debt, and expressly as a means of extending the time of its payment.

If this note can be regarded as a pledge, so may every note made by the same parties in renewal of another. We think there is nothing in this idea. Even if it were a pledge, the plaintiffs kept it until maturity, and were then obliged to sue it. They were certainly not bound to pursue the suit.

The Collins' note having been paid, was allowed by the jury in the verdict. The sewing machine stock is still held by the plaintiffs, but they hold it in trust for the party, North or Boies, from whom they received it, as soon as their debt is paid. They have never made any disposition of it.

Judgment should be for the plaintiffs for the amount of the verdict, with costs.

Judgment accordingly.

JOHN PURCHASE v. MAHLON MATTISON, et al.

When the drawer of a check stops its payment at the bank on which it is drawn, he cannot object to a recovery of its amount by the holder, on the ground that notice of non-payment was not given to him.

Where in such a case the plaintiff averred in his complaint that actual notice of non-payment was given, and the defendant, in his answer, averred that the defendant had stopped payment of the checks, and proof thereof was given on the trial without objection, the court will not entertain the objection that the plaintiff, instead of averring in his complaint notice of non-payment, should have set forth the facts excusing such notice.

Under such circumstances, the case is at most one of mere variance between the complaint and the proof, and as the answer itself shows that the defendants could not have been misled, the variance must be disregarded.

When the plaintiff, in the complaint, avers facts amounting to an excuse for not giving notice of non-payment, and proves such facts on the trial, he is entitled to recover, although he has also averred notice and gives no proof thereof. This latter averment may, and ought to be regarded as surplusage.

The rejection of evidence, which, although in its nature competent to establish the

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fact proposed to be proved, if wholly irrelevant to the issues made by the pleadings, is not a ground of exception.

Where a plaintiff shows a sufficient legal title in himself to the cause of action in controversy, the non-joinder of a third person as plaintiff who has an interest in the recovery, is waived when not set up by answer or demurrer.

When a witness is cross-examined as to matters collateral to the issues, the cross-examining party is bound by his answers, and is not allowed to contradict in order to discredit him.

Negotiable paper lent or advanced by the maker for the accommodation of the borrower, but without restriction as to its use, is good in the hands of a transferee, though received in payment of a pre-existing debt.

A check, payable on demand, advanced to a third person, in consideration of his agreement to do or perform some act beneficial to the maker at a future day, is not an accommodation check, nor without consideration, and it may be collected by the transferee without proof on his part that he paid value therefor, and without proof that such agreement was performed.

(Before SLOSSON and WOODRUFF, J.J.)

Jan. 14 ; March 21, 1857.

THIS case came before the General Term upon a verdict taken subject to the opinion of the court on a case to be made, and ordered to be heard in the first instance at the General Term.

The cause was tried before Oakley, Chief-Justice, and a jury, in November, 1856.

The action was brought upon two checks drawn by the defendants, as partners, by their firm name of Mattison & Co., upon the Mechanics' Bank, dated August 13th, 1856, payable to bearer, and each for the sum of two hundred dollars. The complaint, among other things, stated presentment of the checks, non-payment, and notice to the defendants, and also that, before such presentment, the defendants had stopped the payment, and directed the officers of the bank not to pay them.

The defence set up by the defendants in their answer is, that the checks were obtained from the defendants by one Solinger, and others, fraudulently, without consideration, and with a pre-conceived intent on their part to cheat the defendants.

That the checks were intended to be advances of money under an agreement between Solinger and others, and the defendants, entered into, under representations on the part of Solinger and others, wholly false when made, and promises not intended to be performed, and which were not performed by them.

That the checks were passed by Solinger, and others, to one

Wheaton, a partner, or interested in business with the plaintiff, and by Wheaton to the plaintiff.

That neither Wheaton nor the plaintiff paid any value or parted with any consideration whatever for or on the faith of the checks; and that they knew the purposes for which they were given, and that they were being diverted from the purposes for which they were given, and that the checks were founded upon no consideration.

And that the plaintiff, when he received the checks, knew that the payment thereof had been stopped, and received them in order to recover the amount under the appearance of a holder in good faith.

The answer then denies that the plaintiff is the owner and holder of the checks.

And also denies that the defendants have received notice of non-payment, or that notice of non-payment was given as alleged in the complaint.

Upon the trial, the plaintiff produced, proved, and read in evidence the checks declared on, and proved that on the morning of the day ensuing their date, they were presented at the bank upon which they were drawn by the said Erastus Wheaton, who received them from Solinger for cattle sold by him the previous week for the plaintiff, and that payment was refused, the answer being, that payment had been stopped, and that on the same day he saw one of the defendants, and was told by him that he had stopped the payment of the checks.

The defendants' counsel, on his cross-examination of Wheaton, addressed questions to him to learn the nature of his connection with the plaintiff, and Wheaton denied that he was in partnership with the plaintiff, but represented that he acted as the plaintiff's agent.

And Wheaton testified, on such cross-examination, that he received the checks in part payment of the sum of \$915, which was due to the plaintiff for cattle sold to Solinger on the 6th of August, and with \$315 cash, also received at the same time. The amount was credited to Solinger on the plaintiff's book as a payment, *pro tanto*, of the \$915. Upon this proof the plaintiff relies.

The defendants examined a witness for the purpose of showing the alleged fraud and want of consideration, and he stated the par-

particulars of a settlement between the defendants and Solinger on the evening of the 12th of August, and that Solinger wanted an advance of \$500, and that the defendants kept a slaughtering-house for the accommodation of butchers who had no slaughtering-house of their own, and that for this privilege the defendants received the feet of cattle slaughtered there, and also the first right to buy the hides and fat.

That on such settlement, and after the payment of \$15.70, there remained due to the defendants \$100.

That Mr. Mattison consented to make the advance "if Solinger would turn in the usual amount," and that the \$400, which, together with the balance due, \$100, would make up \$500 for the next week, was to be given by the defendants next morning in two checks.

And he states explicitly, "The consideration for the checks was the agreement of Solinger and others to buy cattle and turn them into the defendants' place, slaughter them there, and turn in the hides and fat, and the balance due over and above this to the defendants was to be paid in the coming week."

The checks were accordingly given the next morning (the 13th) by the witness, (the defendants' clerk or agent,) who took them to Solinger and his associates, before referred to.

Whether Solinger, and others, purchased any cattle, or how many they purchased and killed at the defendants' slaughtering-house; whether any or how much fat, etc., they "turned in" that week to the defendants does not appear; nor whether any or what balance was due to the defendants at the close of the week's business was not shown.

No evidence was given that the parties, Solinger and his associates, did not perform the agreement upon which the checks were given—though the defendants gave in evidence that when his clerk or agent took them the checks, it was stated by one of them that he was bargaining—had ten head of cattle in price, that he was in treaty for them.

In the further progress of the trial the defendants' counsel put various questions to witnesses whom he called for the purpose of showing that Wheaton was a partner with the plaintiff.

Upon objection by the plaintiff's counsel the questions were overruled, and the defendants' counsel excepted.

G. Stevenson, for the plaintiff.

John Graham, for the defendants.

BY THE COURT. WOODRUFF, J.—The ground of defence we deem it material first to notice, is, that the plaintiff did not prove service of notice of non-payment of the checks, as alleged in the complaint. If we deemed it necessary to rest this objection upon the question whether such notice was proved, it would be only giving a reasonable interpretation to the testimony of the witness Wheaton, to say that his conversation with one of the defendants imported notice of the non-payment of the checks. But it was not necessary to prove notice under the pleadings, for two reasons:—

First. Had the plaintiff simply averred demand, refusal and notice, no actual notice was essential to the plaintiff's right to recover, if the defendants had themselves stopped the payment of the checks. It is claimed that, under such an averment, the plaintiff was not at liberty to prove facts which dispensed with the necessity of giving notice. Such was not the rule before the Code. (*Williams v. Matthews*, 3 Cow. 252; *Ogden v. Conley*, 2 John. 274; *Garvey v. Fowler*, 4 Sand. 665.) And although it was, in the case last cited, deemed that under the Code a different rule would prevail, so far that, as a rule of pleading, it must be said that all the facts relied upon must be stated; yet, when the excuse for not giving notice is actually stated in the defendants' answer, viz.: that payment had been stopped, and when evidence to that effect was also given on the trial, without objection, we should be yielding too much to what at most would be, under such circumstances, the merest technicality, if we were to say that the plaintiff was not entitled to recover. In such circumstances it would be a mere case of variance between the complaint and the proof. The answer of the defendants shows that he was not misled thereby. The variance might be either disregarded or the complaint amended. (Code, § 169.)

But, *Second.* The objection had no weight, because the plaintiff has, in his complaint, averred that the defendants stopped the payment of the checks, and this being both admitted and proved, the necessity of showing notice of presentment ceased, and what is

said in the complaint, on the subject of actual notice, may and ought to be disregarded as surplusage.

The plaintiff may say, I rested my claim on the fact that the defendants stopped the payment of the check, and is as well entitled to say this as the defendants are to say he rested his case on an averment of actual notice.

He averred both. If either was proved he is entitled to recover. One is well established; yea, more, it is admitted. It would be trifling with justice to say that he may not have judgment because he did not also prove the other.

The next ground of defence, we think, was wholly unsupported by the evidence. It was proved by the defendants that the consideration for the checks was the agreement of Solinger and others to buy cattle and turn them into the defendants' place, slaughter them there, and turn in the hides and fat. This was a sufficient consideration for the checks, and wholly disproves the allegation in the answer that the checks were without consideration. The checks were valid in the hands of Solinger, etc., the moment they were delivered to them.

The evidence fails to establish any fraud. It was not shown that Solinger and others did not perform their agreement; and if it had so appeared, it is not clear but that the very fact that the defendants stopped the payment of the checks prevented such performance.

It is not apparent that it made any difference to the defendants, so long as Solinger performed the agreement, whether the checks were used to pay for the purchases made the previous week or for the week then running.

Nor does the answer place the defence upon the ground of any misappropriation of the checks, or allege that they were to be applied to any specific purpose.

It is not, in this view, necessary to consider how far the acceptance of the checks as cash, in payment for the bill of the previous week, and crediting the same as cash in the plaintiff's books, made the plaintiff a *bona fide* holder for value.

Under the facts proved, we have no doubt of his right to recover.

The other exceptions taken by the defendants relate to the exclusion of certain testimony which the defendants sought to elicit,

and which they claim was competent proof that Wheaton and the plaintiff were co-partners.

We are clearly of opinion, that whether the testimony offered was, in its nature, competent or not, the evidence was wholly irrelevant and improper.

The non-joinder of Wheaton was not set up as a defence, by answer or otherwise, and, therefore, as an objection to the plaintiff's recovery, was waived.

The fact was wholly without controversy that Wheaton received the checks as the agent of the plaintiff. There was not the slightest proof that either Wheaton or the plaintiff had any knowledge of the origin or consideration of the checks, or the terms upon which they were drawn.

Whether, therefore, Wheaton was interested with the plaintiff, as a partner or otherwise, was wholly immaterial to any issue made by the pleadings, or to any state of facts proved on the trial.

If it be suggested that such evidence would tend to contradict Wheaton, the answer is, that it was on the defendants' cross-examination that Wheaton had denied the partnership, and in that particular the defendants' examination of Wheaton was to a matter purely collateral to the issue and collateral to the facts which it was material to prove, and which he had proved. If the defendants thought proper to examine Wheaton as to such matters, he was bound by his answers, and could not contradict them for the purpose of discrediting the witness. In no aspect of the case, as the pleadings and proofs stood before the court, was the testimony material and proper.

It must not, however, be understood by this that if the testimony had been relevant, that the questions overruled were competent. We are inclined to concur in the ruling of the Chief-Justice in that respect.

We find no just grounds for interfering with the verdict, and must, therefore, direct that judgment be entered for the plaintiff for the amount of his verdict, with costs.

SAMUEL STEVENS, and others v. THE COMMERCIAL MUTUAL INSURANCE COMPANY.

The policy of insurance on which this action was founded, contained a warranty that the vessel insured should not use any foreign port or ports in the Gulf of Mexico, but by a memorandum afterwards indorsed on the policy, the vessel was permitted to use the port of Laguna for one voyage. She sailed on the voyage thus permitted, but on her arrival at Laguna was not permitted to enter and land cargo until she had made an entry at some neighboring port in Mexico. She then proceeded to Sisal, a port in the Gulf of Mexico, about seventy leagues distant from Laguna, and after her arrival there, was driven ashore in a storm and totally lost.

Held, that the voyage from Laguna to Sisal, whether the custom regulations that prevented an entry at Laguna were or were not known at its commencement, was not protected by the memorandum on the policy, and was therefore a plain breach of the warranty in the policy itself, by which the defendants were discharged from the loss.

Complaint dismissed, with costs.

(Before HOFFMAN, SLOSSON and WOODRUFF, J.J.)

January 15; March 21, 1857.

CASE upon a verdict in favor of the plaintiffs, subject to the opinion of the court at General Term, to be heard there in the first instance, with liberty to enter a non-suit if the court should be so advised, and with liberty to turn the case into a bill of exceptions.

The following are the material facts of the case, as established by the evidence on the trial and not disputed:—

Messrs. Brett, Vose & Co. procured for the plaintiffs a policy of insurance upon time on the brig Inda, on account of whom it might concern, from the 3d of October, 1852, to the 3d of October, 1853, in the amount of \$5000. The policy contains the following clause:—"Warranted not to use ports and places in Texas, except Galveston, nor foreign ports and places in the Gulf of Mexico, nor places on or over Ocrocoke Bar."

On the 6th of January, 1853, an indorsement was made on the policy to the effect, that the sale of the brig to Stevens, Peabody & Co. should not prejudice the insurance.

On the 7th of October, 1853, an indorsement was made on the policy, extending it for a further term of one year.

On the 8th of November, 1853, the following indorsement was also made:—"November 8th, 1853, for the additional premium of two per cent. the brig 'Inda' has permission to use the port of Laguna for one voyage, without prejudice to this insurance, additional premium \$100."

The brig sailed from Martinique, in ballast, on the 11th of December, 1853, under a charter, bound for Laguna, to take in a cargo there for Marseilles. She arrived at Laguna on the 25th of December, 1853, but the custom-house officers would not allow her to load there until after she had been entered at a neighboring port, Laguna not being then a port of entry.

Laguna had been previously to the 1st of June, 1853, open to foreign vessels, but was closed by the Mexican regulations of the 1st of June, 1853, and these regulations were in force when the Inda arrived. After advising with merchants there, the captain chose Sisal as the most convenient port to go to for the purpose of entering the vessel, and sailed there for this object.

It had been customary after the regulations of the 1st of June, 1853, for vessels to be entered at some neighboring port, before using Laguna.

The brig might have entered at Vera Cruz, Talasco, or Campeachy, but there were objections to all these ports, and the cholera was prevailing at Campeachy, which rendered a visit there extremely perilous.

The brig arrived at Sisal about seven o'clock, A. M. The master went ashore with the custom-house officers to enter her, and in the afternoon of the same day the brig was driven ashore in a squall, and became a total loss.

No question is made as to the preliminary proofs, nor as to the interest of the plaintiffs in the insurance.

Sisal is about seventy leagues from Laguna, Campeachy about forty, and Talasco about the same distance. Sisal is near the north-western Cape of Yucatan. It would be the first port made, of the three named, on a voyage from Martinique to Laguna. A vessel from Sisal would run down the Gulf nearly south to Campeachy, and thence on about the same course to Laguna. Talasco lies farther west, the coast so tending from Laguna.

Of the adjacent ports of entry, Vera Cruz was the remote west, and was dangerous in the winter. To reach Talasco, it would

have been necessary to proceed over a dangerous bay, and go up a river a considerable distance. At Campeachy, the cholera was raging, and it seems to have been a judicious act in the master to choose Sisal as the place of entry.

F. B. Cutting, for the plaintiff.

D. Lord, for the defendant.

BY THE COURT. HOFFMAN, J.—This case appears to me to be a clear one. There was an express warranty against using any foreign ports or places in the Gulf of Mexico. There was then an exception or qualification of that warranty by permission to use the port of Laguna for one voyage. The exception is limited to that port.

If the parties had knowledge of the Mexican port regulations when the vessel sailed, then the voyage to Laguna, with the necessity of going to another port in the Gulf, and actually passing by Sisal on the way and returning to it, was a plain infringement of the warranty. But if all the parties were ignorant of the regulations, then the question is, whether the insurers, who guarded themselves with a warranty, and made an exception of one port, can be held liable when the vessel reached that port, and was compelled, by these regulations, to go to another?

It cannot be imagined that the insurers intended to cover a voyage in which the vessel had to retrace her path seventy leagues to the northward, in the Gulf of Mexico, and to return again the same distance to Laguna. The warranty rejects it, and there is nothing in the case to justify an inference of such a permission.

I am of opinion that the complaint should be dismissed.

Judgment accordingly.

CYRUS W. FIELD v. DARIUS B. HOLBROOK.

A court of equity has jurisdiction to order an instrument in writing to be delivered up and cancelled, upon the ground that it was either void in its origin, or has been rendered so by subsequent events.

The cases in which this jurisdiction may properly be exercised are the following:

1. When the instrument is alleged to be void upon grounds of which a court of equity alone has cognizance.
2. When the instrument, if uncanceled, would throw a cloud upon the plaintiff's title to such estate.
3. When the instrument is negotiable in its character, as a bill of exchange or promissory note; and, lastly,
4. When the plaintiff claims to have a defence to the instrument, valid in law, but which he is in danger of losing if the adverse party is suffered to delay the prosecution of his claim.

These cases, although differing in their circumstances, rest substantially on the same principle, namely, that if the relief sought be denied, the plaintiff will sustain a present, or be exposed to the hazard of a future, injury and loss. Hence, the relief prayed for will be denied when it is certain that the plaintiff will sustain no such loss, and be exposed to no such hazard if the instrument is suffered to remain in the hands of the adverse party.

Thus, the relief will not be granted when the instrument of which the surrender and cancellation are claimed, is on its face plainly illegal and void; nor when, it is a deed which, from its nature and contents, can throw no cloud upon the plaintiff's title, nor when a negotiable instrument, it is merged in a judgment.

In all these cases the relief is denied upon the single ground that its denial can work no actual prejudice to the plaintiff.

If the mere possibility that a void instrument may be used for vexatious purposes was a sufficient reason for ordering it to be delivered up and cancelled, the relief ought to have been granted in every case in which it has been denied, for in all this possibility existed.

Held, in the case before the court, that as the facts upon which, as a condition precedent, the validity of the contract held by the defendant depended, had never occurred, the plaintiff was in no more danger of a recovery against him upon the contract than had it been on its face illegal and void.

Held, therefore, that the plaintiff was not entitled to demand that the contract should be given up, and that the demurrer to the complaint was well taken.

Order overruling demurrer reversed, with liberty to plaintiff to amend.

(Before all the Judges.)

March 7; March 14, 1857.

APPEAL by defendant Holbrook from an order at Special Term overruling demurrer to the complaint.

The following are the pleadings:

Cyrus W. Field, plaintiff, complains and alleges—

“1st. That on the 24th day of March, 1854, he, together with Chandler White, acting on behalf of themselves and their associates, Peter Cooper, Moses Taylor, and Marshall O. Roberts, entered into an agreement with Ambrose Shea, as agent of Darius B. Holbrook and of Holbrook & Co., a firm consisting of the said Darius B. Holbrook and of ——— Holbrook, as the plaintiff is informed and believes, of which agreement a copy is hereto annexed, marked A.

“2d. That the said Holbrook afterwards caused to be delivered to the plaintiff and his associates an account of the said money, alleged to have been paid by him to them, which they allege to amount, with interest up to the 1st of August, 1854, to the sum of fifty-one thousand eight hundred and twenty dollars eighty cents.

“3d. That on the 29th day of August, 1854, the plaintiff and his said associates caused to be tendered on their behalf to the said Holbrook five hundred and eighteen shares of the capital stock of the New York, Newfoundland, and London Telegraph Company, the par value of each share being one hundred dollars, together with twenty-three dollars and fifty cents, and demanded of him the bonds and stock aforesaid; but the said Holbrook did not receive the said shares, or money, or deliver up the said bonds and stock.

“4th. That as the plaintiff is informed and believes, the said Darius B. Holbrook and ——— Holbrook had not, nor had either of them, during the said month of August, nor at any time since, the bonds and stock of the Newfoundland Electric Telegraph Company aforesaid, or the larger part thereof.

“5th. That, notwithstanding the said tender and refusal, and the inability of the said Darius B. Holbrook and ——— Holbrook to comply with the terms of the said agreement, the said Darius B. is now continually annoying the plaintiff and his associates with his pretended demands upon them, under pretence of the said agreement, and as the plaintiff is informed and believes, threatens to bring suits against them and against the said New York, Newfoundland, and London Telegraph Company in this country and in Newfoundland.

“6th. That the plaintiff has not been able to obtain the consent of his said associates to be joined with him as plaintiffs in this action, and for that reason they are made defendants.

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"7th. That the plaintiff and his said associates are all stockholders in the said New York, Newfoundland, and London Telegraph Company.

"Wherefore the plaintiff demands judgment that the said agreement be delivered up to the plaintiff to be cancelled, and that, in the mean time, the said Darius B. Holbrook and ——— Holbrook, and each of them, be enjoined from commencing or prosecuting any action or actions, suit or suits against the plaintiff and his associates, or the said New York, Newfoundland, and London Telegraph Company upon the said agreement, or for any other cause of action arising out of the said agreement, or connected therewith, or related thereto, and from taking any proceedings against the plaintiff, legal or otherwise, for any matter connected with the interest of the said D. B. Holbrook and ——— Holbrook, or either of them, in the said Newfoundland Electric Telegraph Company, or the claims of them, or either of them, against the said company."

"City and County of New York:

"Cyrus W. Field, the above-named plaintiff, being sworn, saith that the foregoing complaint is true of his own knowledge, except as to those matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

"CYRUS W. FIELD."

"Sworn, April 8th, 1856, before me,

"P. J. MOLLOY, Commissioner of Deeds."

"St. Johns, March 24th, 1854.

"AMBROSE SHEA, Esq.,

"Dear Sir:—In compliance with the verbal understanding had with you we stated that we have agreed with you, as agent of Messrs. Holbrook & Co. and D. B. Holbrook, to give them, respectively, stock at par in the New York, Newfoundland, and London Telegraph Company, for the actual amount of money paid by them (and interest at seven per cent.) for the Newfoundland Electric Telegraph Company, and actually received by that company, such stock to be given to them on their demanding it of us

Field v. Holbrook.

in New York at any time in the month of August next, and on their surrendering to us all the bonds and stock received by them from said Newfoundland Electric Company.

"Your obedient servants,

"CHANDLER WHITE,

"CYRUS W. FIELD,

"On behalf of the associates."

"I accept the above terms on account of Messrs. Holbrook & Co., and D. B. Holbrook.

"St. Johns, Newfoundland, March 31st, 1854.

"(Signed,)

A. SHEA."

The defendant, Darius B. Holbrook, demurs to the complaint of the plaintiff, and states the following grounds of demurrer:

"1st. That said complaint does not state facts sufficient to constitute a cause of action.

"2d. That it does not state facts sufficient to entitle plaintiff to the relief demanded in the complaint.

"3d. That it does not state that plaintiff, or the associates, (of whom he is one,) offer, or are ready, or able, or willing, or have, since the 29th day of August, offered, or been ready, or able, or willing to pay this defendant, or the firm of Holbrook & Co., the stock in said complaint mentioned, to the amount of fifty-one thousand dollars and more.

"4th. That plaintiff does not offer to fulfill, on the part of himself or of his associates, the contract in said complaint mentioned.

"5th. That said complaint does not state to whom, (which of said defendants Holbrook,) said tender was made, and does not state that it was made to this defendant, or to the firm of Holbrook & Co.

"6th. The contract appears from the complaint to have been made in Newfoundland, and the complaint states no sufficient cause for compelling defendants to come here to litigate their rights, or why they should not be allowed to prosecute their claims there, as they must be advised.

"7th. The parties jointly interested with the plaintiff, namely, Cooper, Taylor, Roberts, and White, in the complaint mentioned, are not joined as plaintiffs, and there is, in this respect, a want of parties plaintiff herein."

HOFFMAN, J., gave the following reasons for his decision:—

Field, the plaintiff, with Chandler White, on behalf of themselves and their associates, agree with Holbrook & Company, and D. B. Holbrook, to give them stock, at par, in a certain telegraph company, for the amount of money paid by them for another company. The condition of the contract was that the new stock should be given, on Holbrook & Company and D. B. Holbrook demanding it in New York in the month of August ensuing, and upon surrendering all the bonds and stock received by them of the other company.

This contract is dated 31st of March, 1854.

The plaintiff states a tender on the 27th of August, 1854, on behalf of himself and his said associates, to said Holbrook, of five hundred and eighteen shares of the capital stock of the company, the par value being \$100 a share, together with \$23.80 in cash, and that they demanded of him the bonds and stock of the other company which were to be surrendered.

An account had been rendered by Holbrook prior to this tender of the moneys paid, amounting, with interest, on the first of August, 1854, to the sum of \$51,823.80.

The plaintiff, on the ground of this tender and Holbrook's refusal to fulfill the contract, (and also upon an allegation of Holbrook's not having the bonds and stock of the former company to surrender,) demands a cancelment of the agreement, or, at any rate, an extinguishment of it as to himself, and an injunction to stay suits threatened against him.

The other associates having declined to be made plaintiffs, are made defendants.

The chief question raised is this: The plaintiff is under a contract with the defendants Holbrook, which, he says, their default enables him to cancel and remove from embarrassing him. Is he bound to wait until these defendants think proper to sue him, and then resist, and defeat them? May he not compel them to free him from it now, or to litigate the case with him at once?

The cases which relate to the rescission and cancellation of agreements are more applicable to the present question than bills *quia timet*. These authorities are collected to a considerable extent by Justice Willard. (Eq. Jurisprudence, p. 302.)

I think there is a manifest equity with the plaintiff to bring the

question of his responsibility to a close. It may not be certain that his right to rescind the contract was absolute; some equity possibly may rest with the defendants. (Parsons on Contracts, 191, and notes M. and N.) I admit that I am proceeding upon the application of a general principle, for I have not met with a case in point.

Demurrer overruled. Judgment for plaintiff, with costs, and liberty to answer in twenty days.

D. Lord, for appellant.

D. D. Field, for respondents.

BY THE COURT. DUER, J.—It was admitted upon the argument, by the learned counsel for the defendants who have demurred, that, admitting the allegations in the complaint to be true, and the demurrer admits their truth, the written contract of which these defendants retain the possession has been rendered void in their hands, from their failure and inability to comply with its provisions, within the time limited for their performance.

The main question to be determined, therefore, is, whether, upon this admitted statement of facts, the jurisdiction of the court can be properly exercised, by ordering the contract to be delivered up and cancelled? The question is, in a measure novel, and possesses a more than ordinary interest and importance.

It cannot be denied that, in numerous cases, the Court of Chancery has exercised the jurisdiction that is questioned, by ordering an instrument in writing to be delivered up and cancelled, upon the ground that it was either void in its origin, or had been rendered so by subsequent events, and it is just as undeniable that, in many cases, in which the instrument in question was admitted to be absolutely void, the court has refused to compel its surrender; and although the cases there referred to seem to be opposed, it must also be confessed that they carry with them an equal weight of authority. As the decisions proceed upon distinct grounds there is, in reality, no conflict between them; and the inquiry, therefore, is, which, as most applicable to the case before us, are we now bound to follow? and this can only be answered by ascertaining the reasons upon which they are respectively founded.

I am convinced, by an attentive examination of the authorities, that the cases in which, alone, the jurisdiction of which the exercise is now claimed can be said to be established and undoubted, may be reduced to the following classes:

1st. When the plaintiff alleges that the instrument, which he prays may be surrendered or cancelled, is void upon grounds of which a court of equity alone can take cognizance; in fewer words, when he sets up a purely equitable defence.

2d. When the instrument is a deed, or other document, concerning real estate, which, although inoperative, if suffered to remain uncanceled would throw a cloud upon the title of the plaintiff to the lands which it embraces, or to which it refers. (*Pierce v. Webb*, 3 Barb. Ch. R., 16; *Jackman v. Mitchell*, 13 Vesey Rep. 581; *Hayward v. Dunsdale*, 17 Vesey Rep. 111; *Attorney-General v. Morgan*, 2 Russell Rep. 306; *Petit v. Shephard*, 5 Paige Rep. 493; *Van Doren v. The Mayor of New York*, 9 Paige's Rep. 388; 2. Story's Eq. Jur. 6th ed. § 700, n. (2), and other cases there cited.)

3d. When the instrument is negotiable in its character, as a bill of exchange, etc., and the putting it into circulation would be a fraudulent act. (2 Story's Eq. Jur. *ut sup.* § 700, n. (1), and cases there cited.)

4th. Where the plaintiff claims to have a defence valid in law, but which rests upon evidence that he is in danger of losing, if the adverse party is suffered to delay the prosecution of his claims. (*Hamilton v. Cummings*, 1 John. Ch. R. 520, etc.; 2 Story's Eq. Jur. *ut sup.* n. (3), and cases cited.)

Although these several classes differ widely in their special circumstances, yet, when examined, it will be found that in all the decisions rest substantially upon the same grounds, and these grounds are, that the plaintiff will either sustain a present, or be exposed to the hazard of a future, injury and loss, should the defendants be suffered to retain the possession of the instrument of which the delivery and cancellation are demanded. They are all, therefore, referable to one common and acknowledged head of equity jurisdiction, the prevention of an injury that might otherwise prove irreparable, and which a court of equity is alone competent to avert or prevent.

That such are the grounds upon which, in these cases, the relief

prayed for has been granted, is still more evident when we advert to the cases in which the same relief has been denied.

Although there is some contrariety in the earlier cases, the law is now settled that the court will not order an instrument to be delivered up and cancelled which, upon its face, is plainly illegal and void. (*Simpson v. Lord Howden*, 3 Mylne & Craig, Rep. 97; *Pierson v. Elliot*, 6 Peters' Rep. 94; 2 Story Eq. Jur. § 700 [a], and cases cited.)

Nor a deed of lands when it is certain that, from its nature and contents, it can throw no cloud upon the title of the plaintiff (*Cox v. Clift*, 2 Comstock Rep. 118.) Nor a negotiable instrument that has been merged in a judgment. (*Threlfall v. Suni*, 7 Sim. Rep. 627.) Nor a policy of insurance that had been rendered void by a deviation. (*Thornton v. Knight*, 16 Sim. R. 509.) And in all these cases the denial of the relief rests upon one and the same ground, namely, that the plaintiff is exposed to no hazard from any future litigation, since it is certain that in no action founded on the instrument can a recovery be had against him.

It appears to us that this reasoning applies, in its full extent, to the case before us, and that the decisions last cited must, therefore, govern our own. We are unable to state a distinction. The contract held by the defendants is alleged to be void, from their inability to establish the facts, which they must prove upon a trial, to enable them to maintain their action, and as this inability arises from the non-existence of the facts, it is certain that it cannot be removed, and, therefore, certain that the plaintiff and his associates are exposed to no hazard from any future litigation. They are in no more danger of a recovery being had against them than if the contract were illegal and void upon its face.

It may, indeed, be said that if the defendants shall be suffered to retain the possession of the contract, they may use it for the sinister purpose of harassing the plaintiff and his partners by vexatious suits, but the reply is obvious and conclusive. If the possibility that a void instrument may be vexatiously and maliciously used were a sufficient reason for ordering it to be delivered up and cancelled, it is plain that the relief sought ought to have been granted in every case in which it has been denied, and indeed ought to be granted in every case in which, upon sufficient grounds, the instrument is alleged to be void; for in all such cases that

have arisen, or that can arise, the same possibility will be found to exist. We have neither the power nor the disposition, however, to enlarge our jurisdiction as a court of equity by extending it to cases that hitherto it has been held not to embrace. On the contrary, we are convinced that its exercise ought to be strictly confined within the limits that hitherto have been invariably observed. When a suit like the present is entertained, the necessary effect is to transfer a controversy, legal in its nature, from a court of law into a court of equity, and thus to deprive the party who is made the defendant of his legal rights of selecting his own tribunal and his own time for the prosecution of his claims, of having all questions of fact determined by a jury, and of controlling and managing his suit in the exercise of his own discretion; and it seems to us manifest that it is only in cases where reasons of a controlling equity are shown to exist that the exercise by a defendant of these legal rights can be justly restrained.

We cannot believe that a court of equity is bound to interfere whenever a party liable to be sued upon a written instrument in a court of law chooses to allege that the instrument is void. Such, however, is the naked case before us.

In the early and leading case of *Hamilton v. Cummings*, (1 John. Ch. Rep. 517–523,) Chancellor Kent, after an elaborate review of the English decisions, arrived at the conclusion, that the power of a court of equity to order a written instrument to be delivered up and cancelled, is discretionary in its nature, and depends for its exercise upon the special circumstances in each case, showing that a resort to the court is necessary or eminently proper. We believe that this is a just view of the law as it still exists, and it necessarily follows that when an appeal is made to this discretionary power of the court, the special circumstances that can alone justify its exercise must be set forth in the complaint, since these are emphatically the facts that constitute the cause of action. No such facts, however, are alleged in the present complaint, and we must consequently hold that the demurrer is well taken.

The order at Special Term overruling the demurrer, is, therefore, reversed, and there must be judgment for the defendants, who have demurred, unless the plaintiff shall, within twenty days, serve an amended complaint, pay the costs of the demurrer, and ten dollars as the cost of this appeal. Order accordingly.

JOHN D. HARRIS, and another v. GEORGE HART, and another.

The right of a vendor to stop in transitu goods which he has sold upon credit to a vendee who becomes insolvent, can only be properly exercised while the goods are in the hands of a carrier or middleman in their transit to the vendee, and before they have come into his actual possession. The simplicity of the rule, however, as laid down in the earlier cases in England, and which, in order to defeat the vendor's right of stoppage, required an actual delivery to the vendee himself, so as to bring the goods within his corporal touch, has been broken in upon by the later decisions, which hold, that in some cases a constructive delivery, and in some an exercise by the vendee of acts of ownership, is sufficient to defeat the right of the vendor.

But, in the opinion of the court, a fair comparison of the cases, notwithstanding some contradictions, leads to and justifies these conclusions:—

1. That a mere constructive delivery, though sufficient to entitle the vendor to demand the price of the goods and to place them at the risk of the vendee, does not alone defeat the right of stoppage.
2. That while the goods are in the course of transportation to the place of destination, or are in the hands of an intermediate agent or warehouseman for the purpose of being forwarded, they are subject to the right.
3. That they are also subject to the right after their arrival at their place of destination while in the hands of the carrier, or of a wharfinger or warehouseman, for the mere purpose of delivery to the vendee.
4. That a delivery to the vendee's special agent, on board a conveyance owned or chartered by the vendee, if the sole purpose of such delivery is transportation to the original port of destination, does not defeat the right of the vendor.

But the vendor's right of stoppage is lost in the following cases:—

1. Where the goods have come into the actual possession of the vendee.
2. Where, after their arrival at the place of destination, the vendee exercises acts of ownership over them.

And lastly, where an agent of the vendee, having authority and power to dispose of the goods, exercises like acts of ownership.

Held, that although the doctrine for which the defendants' counsel contended, namely, that where the goods purchased, in the course of transportation are detained at an intermediate place, and without further orders cannot again be put in motion, the transitus is at an end, is favored, it is very far from being established by the recent decisions in England upon which the counsel relied.

Held, that in each of the cases so relied on, there were material circumstances by which each was discriminated from that before the court, and which were alone sufficient to justify the actual decision.

Held, that in the case under judgment, the transitus was not ended by the temporary detention of the goods at Liverpool by the agents employed to forward them, since the agents had no power to change the ultimate port of destination as fixed by the vendor and vendee, and there was no proof that any such change was intended by any of the parties. The orders for which the forward-

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ing agents waited, related not to the place of destination, but merely to the time and mode of transportation.

Held, further, that the transitus was not ended merely by the fact that after the arrival of the goods at New York, they were entered at the custom house and the duties paid, before the plaintiff attempted to exercise his right of stoppage. Nor was the transitus ended upon the ground that the goods in question had been previously assigned to the defendants for the payment of debts. An assignee, for the benefit of creditors, is not entitled to protection as a *bona fide* purchaser, but stands in the same condition as his assignor.

Held, that if there is that conflict between the decisions in England which is alleged, there are strong reasons why the court should follow in preference the more liberal doctrine of the earlier cases.

Held, that if the decisions upon which the counsel for the defendants relied, are to receive the construction which he gave to them, they are directly opposed to several cases in our own courts which this court deems itself bound to follow.

Held, that the plaintiffs were entitled to judgment upon the verdict rendered by the jury in their favor.

Before DUER, BOSWORTH and WOODRUFF, J.J.)

Dec. 12, 1856; March 14, 1857.

MOTION on the part of the plaintiffs for judgment upon a verdict in their favor, judgment having been suspended by order of the court.

The action was brought to recover the possession or value of certain merchandise, in relation to which the plaintiffs claimed to have duly exercised their right of stoppage as vendors, the vendees having become insolvent before any delivery of the goods.

The answer wholly denied the title of the plaintiffs.

The cause was tried before Woodruff, J., and a jury, in May, 1856. Upon the trial the counsel for the parties submitted the case upon sundry depositions, in connection with certain facts which are either admitted, or are agreed to be taken as proved; and, for the purpose of raising the questions of law, upon which the rights of the parties depend, by request of the respective counsel, the Judge denied the defendants' motion to dismiss the complaint, and directed the jury to find a verdict for the plaintiff, subject to the opinion of the court, and, in further pursuance of the arrangement of counsel, directed the exceptions taken by the defendants to the ruling to be heard, in the first instance, at the General Term. Judgment to be, in the mean time, suspended.

The counsel of the parties agreed that there was no conflict in the evidence given on the trial, and, consequently, that the only

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questions to be determined by the court at General Term, were questions of law. The following are all the facts deemed material by the court, upon which these questions arose:—

The plaintiffs are manufacturers in Leicester in England, and John and James Hall, from the year 1839 down to the time of the transactions in question, were merchants and partners, dealing in lace and hosiery, carrying on their business at Nottingham in England, where John Hall resided, and at the city of New York, the residence of James; the business done at Nottingham being conducted under the firm name of J. & J. Hall, and the business at New York under the name of Hall Brothers.

That, as early as the year 1845, they commenced a course of dealing with the plaintiffs, which consisted exclusively in the purchase of goods from the plaintiffs, to be shipped to the cities of New York and Boston, to be sold by, or under the direction of their firm of Hall Brothers, of New York; and the goods were paid for by bills drawn upon J. & J. Hall, of Nottingham, at four months.

That, as a general rule, the goods so purchased were sent by the plaintiffs to Liverpool for shipment, and (with a single exception) were directed by the Messrs. Hall to be sent, for that purpose, to Messrs. Edwards, Sanford & Co., of Liverpool, shipping and commission agents, engaged in forwarding goods to the United States. In a few instances small quantities of goods were ordered from the plaintiffs, in which, as the witness expresses it, "the quantity was too small to make up a case," and they were sent by the plaintiffs directly to the Messrs. Hall at Nottingham; but these instances are clearly shown to be exceptions to the general course of dealing.

It distinctly appears that all of the goods which, in this course of dealing, were sent to Messrs. Edwards, Sanford & Co., were not only purchased for the New York and Boston markets, but were sent to the forwarding house in Liverpool for the sole purpose of shipment to New York or Boston, to be disposed of by the firm of Hall Brothers, of New York, and that this was the uniform destination of the goods sold by the plaintiffs, and known to them; and that the goods ordered by the Messrs. Hall, were ordered for that express destination, and were, in fact, made for that market.

This being, and having long been, the course of business between the plaintiffs and the Messrs. Hall, it further appears that, in the years 1853 and 1854, the defendant Pratt was in the employment of the Messrs. Hall, residing in the city of New York, but making periodical visits to England, acting as buyer of goods for the New York house; and in October, 1853, he called upon the plaintiffs, at their warehouse, and purchased the goods which are now in question, stating that the destination of the goods was New York, (the goods being made for that market,) and directed the plaintiffs to pack them in the usual way, and forward them to Liverpool, to Edwards, Sanford & Co.

Although the goods were purchased (or ordered) in October, 1853, Messrs. J. & J. Hall, by letter from Nottingham, advised the plaintiffs that the goods would not be wanted for shipment before May, and added that "the marks and numbers can be given you at the time we require their being sent off."

Accordingly, the marks and numbers having been furnished to the plaintiffs, they, on or about the 25th of April, 1854, forwarded the goods in question to Liverpool, to the address of Messrs. Edwards, Sanford & Co., advising them thereof, and stating in the letter that the goods were sent to them "for Messrs. J. & J. Hall, of Nottingham, from whom you" (E. S. & Co.) "will receive further instructions," at the same time advising Messrs. J. & J. Hall, by letter, that the goods "are sent to Messrs. E. S. & Co., Liverpool, to await your" (J. & J. Hall's) "further instructions for shipment."

The Messrs. Hall thereupon instructed E. S. & Co. to ship the goods to their New York house by the sailing packet of the 18th of May, or, if too late for her, then by a subsequent packet.

The goods were accordingly shipped by E. S. & Co. to New York, consigned to Hall Brothers.

Before the arrival of the goods at the port of New York, James Hall died at New York, the Messrs. Hall suspended payment, and became insolvent.

The vessel containing the goods arrived at the port of New York on the 10th of June. On the 13th of June, John Hall, the survivor, assigned all the assets of the firm to the defendants, in trust for the payment of the debts of the firm.

On the last-mentioned day, the goods being still on board the

ship, the plaintiffs demanded the goods from the agent or consignee of the owners of the vessel, and of the officers of the New York custom house on board of the vessel; and, on the same day, notified the defendants of such demand, and claimed the right to stop the goods *in transitu*, and offered to pay the freight and charges thereon.

Before the defendants received the notice last mentioned, they had on that day, and after the said assignment to them, made an entry of the goods at the New York custom house; and to the notice received from the plaintiffs they replied, denying that any right of stoppage *in transitu* had ever existed, and claiming that if any such right had existed the *transitus* had ended before the right was exercised.

H. Nicoll, for the plaintiffs, in moving for judgment, argued substantially as follows:

I. The right of stoppage *in transitu* is an equitable lien adopted by the law for the purposes of substantial justice. It may be enforced upon the insolvency of the vendee whenever the goods have not reached the place of ultimate destination indicated to the vendors, and where there has not been a final delivery and absolute reduction of the same to the possession of the vendee. (*Hodgson v. Loy*, 7 T. R. 445; *Abbott on Ship*, (Perkins's edition,) chap. xi.; *McEwen v. Smith*, 2 House Lords Ca., 329, per Lord Campbell; *Tucker v. Humphrey*, 4 Bing. 516, per Park, J.)

II. In the present case, the ulterior destination of the goods, as named to the vendors, was New York; the transit was, therefore, not ended until their arrival at that port.

III. The control had by the forwarders, Edwards, Sandford & Co., over the goods upon their arrival at Liverpool, and while the same were lying at the railway depot, was only for the purpose of transmission to, and delivery at, the ultimate place of destination. They never had charge of the merchandise for any other purpose. Their control, therefore, was in no sense such a constructive possession on the part of the vendees as would defeat the vendor's right to stop the goods *in transitu*. (*Buckley v. Furniss*, 15 Wend. 137; *Hitchcock v. Covill*, 20 Wend. 167; same case in Error, 23 Wend. 611; *Ellis v. Hunt*, 3 T. R., 465, and cases cited;

Bohtlink v. Inglis, 3 East. 395; *Mills v. Ball*, 2 Bos. & Pul. 457; *Smith v. Goss*, 1 Camp. 282; *Tucker v. Humphrey*, 4 Bingh. 516; *Aguirre v. Parmelle*, 22 Conn. 473.)

IV. The reduction to possession by the vendee, sufficient to defeat the vendor's right of stoppage *in transitu*, must be of a character inconsistent with the idea of a continuance of the transit. Where the acts relied upon as evidence of such possession are equivocal, they must be judged of by the circumstances attending them, and explaining the purpose with which they are done. (Smith's Leading Cases, vol. 1, p. 551, (Hare & Wallace's edition,) vol. 43, Law Lib.; *Nichols v. Le Feuvre*, 2 Bing. N. C. 81; *Jackson v. Nichol*, 5 Bing. N. C. 508; *Coates v. Railton*, 6 Barn. & Cress. 422; *Jones v. Griffin*, 1 Mees. & Wels. 21; same case, 2 Mees. & Wels. 624; *Stubbs v. Lund*, 7 Mass. 453; *Ilseley v. Stubbs*, 9 Mass. 65; *Whitehead v. Anderson*, 9 Mees. & Wels. 519; see also cases cited to point III.)

V. In the present case the vendees never had any actual possession of the merchandise; the only act exercised by them was to direct by what vessel the shipment was to be made from Liverpool to their house in New York. This act was not done with any intent to take possession, but simply for the purpose of continuing and furthering the transit to this port. In designating the vessel by which the shipment was to be made, the house of J. & J. Hall are to be regarded simply as agents assisting in dispatching the goods to their place of ultimate destination.

VI. At the time of the demand by the plaintiffs of the goods at this port, the same had not been landed from the ship, nor had any act been done sufficient to vest the possession of the same in the defendants. (*Mottram v. Heyer*, 1 Denio, 483; same case in Error, 5 Denio, 629.)

VII. For these reasons we insist that the verdict taken in the case should be confirmed, and judgment entered in conformity therewith.

A Mathews, for the defendants.

I. We insist the vendor's right of stoppage *in transitu*, as to the goods in question, terminated at Liverpool, in April, 1853. (*Biggs v. Barry*, U. S. Circuit, Boston July, 1855, Curtis, J., Mss.; *Mottram*

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v. *Heyer*, 2 Leg. Obs. 25; 1 Denio R. 487, and 5 Denio R. 629; *Valpy v. Gibson*, 4 Mann. Gr. and Scott R. 837.) The constructive possession of the vendee is sufficient to terminate the right of stoppage *in transitu*. (*Sawyer v. Joselin*, 20 Vermont R. 172.)

The plaintiffs consigned the goods to E. S. & Co., at Liverpool, to hold subject to the instructions of J. & J. Hall. Liverpool was thus the place of ultimate destination of the goods, as between vendor and vendee. The goods reached their place of destination when they arrived at Liverpool, and came under the control of E. S. & Co. (*Rowe v. Pickford*, 8 Taunt. R. 83; *Leeds v. Wright*, 3 Bos. & Pul. R. 320.)

The goods came to the constructive possession of, and under the control of the purchasers, J. & J. Hall, when they came to the hands of E. S. & Co. This control was exercised while E. S. & Co. kept the custody of the goods, and also when they afterwards obeyed the instructions of the purchasers, J. & J. H., (as to when and where to ship the goods,) and shipped them to a foreign market. (*Buckley v. Furniss*, 15 Wend. R. 145; *Dixon v. Baldwin*, 5 East. R. 175; *Dodson v. Wentworth*, 5 Scott R. 821.)

E. S. & Co. were the special agents or bailees of J. & J. H., the vendees, at Liverpool, and there represented them. They received the goods for disposal as J. & J. H. should subsequently direct. The goods were in fact thus delivered to the vendees, and afterwards shipped (through their agents) by the vendees to New York. This taking possession, and this exercise of ownership, alone put an end to the right to stop *in transitu*. (*Valpy v. Gibson*, 4 Mann. Gr. and Scott, B. R. 837; *Bolin v. Huffnagle*, 1 Rawle R. 9; *Meletopulo v. Ranking*, 1 N. Y. Leg. Obs. 299; *Fowler v. Kymer*, (cited,) 3 East R. 396; *Dodson v. Wentworth*, 4 Man. and Gr. 1080, and 2 N. Y. Leg. Obs. 46.)

After the goods arrived at Liverpool, E. S. & Co. were the warehousemen of J. & J. H. The possession of E. S. & Co. was the possession of J. & J. H. The goods could not be moved until a new direction was given to them by the vendees. The motion imparted to the goods by the vendors was exhausted. Messrs. E. S. & Co. did not know whither to send the goods until another destination was designated for them by the orders of J. & J. H., and so the original *transitus* was at an end. (*Dixon v. Baldwin*, 5 East R. 154; *Hayes v. Merrivile*, 14 Penn. (2 Harris,) 48; *Rowe*

v. *Pickford*, 8 Taunt. R. 83; *Richardson v. Goss*, 3 Bos. & Pul. R. 119; *Foster v. Frampton*, 6 Barn. & Cres. R. 107; *Wentworth v. Outhwaite*, 10 Mees. & Wels. R. 436; *Dodson v. Wentworth*, 2 N. Y. Leg. Obs. 46, and 4 Mann & Gran. R. 1080; *Allen v. Gipper*, 2 Cromp. & Jer. R. 218; *Scott v. Pettit*, 3 Bos. & Pul. R. 469; *Barrett v. Goddard*, 3 Mason R. 107.)

II. We next insist, that the goods having arrived in New York, and the firms of J. & J. Hall and Hall Brothers having assigned them to defendants for the benefit of creditors, and the defendants having possession of the bills of lading, and having entered the goods at the custom-house, before the plaintiffs demanded the goods, the plaintiffs' right of stoppage *in transitu* was terminated in New York, if not already terminated in Liverpool. (*Mottram v. Heyer*, (cited above); *Wright v. Laws*, 4 Esp. R. 82; *Foster v. Frampton*, 6 Barn. & Cres. R. 107.)

III. Upon the facts proved and uncontradicted, the defendants are entitled to have the complaint dismissed, with judgment for them, with costs.

BY THE COURT. WOODRUFF, J.—It is not claimed that, (if the right of stoppage *in transitu* existed on the 14th day of June, 1854, when the plaintiffs demanded the goods,) the demand made by the plaintiffs and the notice thereof were not a proper and sufficient exercise of that right to entitle the plaintiffs to take the goods and to recover in this action.

The defendants denied the right, and afterwards paid the freight and duties, and took possession of the goods, but this was not only after the rights of the parties had been fixed by the demand and refusal, but after this suit was brought. The case must, therefore, be disposed of according to the rights of the parties on the 14th of June, when the demand and refusal took place; and the great question in controversy is,

Had the plaintiffs, when the goods were demanded, the right to stop the goods?

This question involves two inquiries—

1st. Did the plaintiffs' right, as vendors, to stop the goods, terminate at Liverpool, when the goods were received by the firm of Edwards, Sandford & Co.? or if not then, 2d. Did it terminate at New York before the plaintiffs demanded the goods?

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The general principle which defines the right of the vendor who has sold goods upon credit to a vendee who becomes insolvent or bankrupt to stop the goods, is not controverted. It appears to have been first recognized as an equitable right in the English Court of Chancery, in 1690, (*Wiseman v. Vandeput*, 2 Vernon, 203,) and afterwards in the same court, in 1743, (*Snee v. Prescott*, 1 Atk. 248-9,) by Lord Hardwicke, and soon after it was sanctioned at law as a strictly legal right, though founded in equitable principles, and has ever since been so regarded. (See *Mason v. Lickbarrow*, 1 H. Bl. 357, and cases cited, p. 365, etc., and in notes.)

The limitation upon the above definition requires that the right be exercised while the goods are in the hands of a carrier or middleman in their transit to the consignee or vendee, and before they come to his actual possession, or as defined by Story, "while in the hands of some intermediate person between the vendor and vendee in process, and for the purpose of delivery." (Story on Sales, § 319.)

The application of this principle would, at first view, seem free from great difficulty, but the course of decision in England shows that the rule was soon qualified by an inquiry as to what circumstances should be deemed equivalent to actual possession by the vendee, which at the same time involved the inquiry what, under given circumstances, was to be deemed the destination of the goods, and when the *transitus* should be deemed at an end?

And it is a matter of some interest to observe, that although the courts in England characterize the right as one highly equitable in its nature, and as regarded with favor in courts of law, they have at the same time been restricting its operation and rendering it less and less beneficial to the vendor.

In very early cases, Lord Mansfield not only held that a constructive possession by the consignee by actual delivery to his special agent did not defeat the right of the vendor to stop the goods, but that there must be an actual delivery to the consignee himself; and again, that the goods must have come to the corporal touch of the vendee, (*Stokes v. Le Riviere*, 1784; *Hunter v. Beale*, 1785, cited in 3 J. R. 466, and in many subsequent cases,) and Lord Kenyon says, in *Wright v. Laws*, (4 Esp. 85,) that he once so stated the rule. But as will be seen by cases below cited, the necessity of their either coming to the consignee himself or to

his corporal touch was soon after repudiated, and has since been very uniformly denied.

So, in the same case of *Hunter v. Beale*, the exercise of acts of ownership over the goods by the vendee, while they remained in the hands of the innkeeper to whom they were sent by the vendor directed for the vendee, was held by Lord Mansfield not to defeat the right.

And in 1795, it was held that, when the goods arrived in the vendee's ship, at the port of delivery, and his assignees took possession of the ship, but she was ordered to quarantine without coming to her wharf, the vendor might stop the goods while she was lying at quarantine, (*Holst v. Pownal*, 1 Esp. 240,) Lord Kenyon saying, "that the possession which will defeat the right must be a possession at the completion of the voyage."

But in *Wright v. Laws*, (4 Esp. 82,) the same learned Judge held it sufficient to defeat the right if the vendee has exercised acts of ownership over the goods—as by calling at the warehouse and taking samples—and in a previous case, (*Ellis v. Hunt*, 3 J. R. 464,) in 1789, it was held sufficient, if a vendee, or his assignee in bankruptcy, went to the inn at which the goods had arrived, and demanded them, and they not being delivered, put his mark upon them.

In *Hodgson v. Loy*, (7 T. R. 440,) delivery by the vendor to a carrier, and by him to a wharfinger at an intermediate place, without any instructions from the vendor to forward the goods, was held not to take away the right; the wharfinger being under general orders from the vendee to forward goods received for him to London. (See also *Smith v. Goss*, 1 Camp. 282.)

In 1801 it was held, that delivery to a wharfinger at an intermediate place, who received them on account of the vendee, and paid charges thereon, debiting them to the vendee, did not defeat the right of stoppage, though the wharfinger was under no orders to forward except so far as they might be implied from their acceptance, they being consigned to the vendee. (*Mills v. Ball*, 2 Bos. & Pul. 457.)

But in *Richardson v. Goss*, (3 Bos. & Pul. 119,) the court intimate, that delivery at a wharf at the place of destination to the wharfinger, who had, before their arrival, received directions from

the vendee to receive them from the carrier, terminated the right of stoppage.

The right of stoppage was also held to be lost where goods were purchased for a vendee living in Paris, and were consigned to his agent in London, who sent them to a packer to be re-packed, and some of the goods had been unpacked and sent away by such agent, (*Leeds v. Wright*, 3 Bos. & Pul. 320;) but it is to be observed, that in this case the agent had authority not merely to forward the goods, but had a general authority over the goods to send them to such market as he might deem advisable. And to a similar effect is *Scott v. Pettit*, (*ib.* 469,) where under a general direction to the innkeeper to send all goods directed to the vendee (at London,) to a packer's, the goods were so sent, and there unpacked.

And to the like effect is *Foster v. Frampton*, (6 Barn. & Cress. 107,) where, on arrival at the carriers' warehouse at the place of destination, the vendee removed part of the goods, took samples of the residue, and requested the carrier to suffer them to remain there till further orders.

Taking samples was deemed a complete act of ownership, and the right terminated by the vendee's treating the goods themselves as his own property.

Other acts of ownership are held to defeat the right; see *Withers v. Seys*, (Holt, 18,) and review of cases in the note to that case, (3 E. C. L. R. 10,) and *Swanwick v. Southern*, (9 Ad. & El. 817.)

In *Inglis v. Underwood*, (1 East. 515,) it was held, that the delivery of the goods on board a ship chartered by the vendee to bring the goods home to himself, put an end to the right. This was in direct conflict with *Holst v. Pownal*, above referred to, and in *Botlingk v. Inglis*, (3 East. 381,) the contrary is distinctly held.

While, on the other hand, a delivery on board a vessel chartered by the vendee, to be sent abroad on a trading adventure, is deemed to destroy the right of stoppage. (*Ib.*, and *Fowler v. McTaggart & Co.*, there cited.)

These cases, notwithstanding some contradictions, tend to this result, that a merely constructive delivery, though sufficient to entitle the vendor to demand the price of the goods, and to place the goods at the vendee's risk, does not alone defeat the right of stoppage.

That while the goods are in course of transportation to the place of destination, or are in the hands of an intermediate agent or warehouseman for the purpose of being forwarded, they are not subject to this right.

That after their arrival at the place of destination, and while in the hands of the carrier, or a wharfinger, or a warehouseman for the mere purpose of delivery to the vendee, the vendor may resume the possession.

That delivery to the vendee's special agent on board the vendee's own conveyance, or a conveyance chartered by him, if the purpose of the delivery is transportation to the vendee, does not defeat the right.

But that the right is lost if the vendee received actual possession; or if after their arrival at the place of destination he exercise acts of ownership over the goods; or if his agent, having authority and power of disposal, exercises like acts.

As if the goods are by order of the vendee or such agent sent to a packer, or to the warehouse of a third person, or are charged on the books of the warehouseman at whose warehouse they arrive, so that he undertakes to keep them, subject to the orders of the vendee. (*Hawes v. Watson*, 2 Barn. & Cress. 540; *Withers v. Sey*, Holt, 18; *Swanwick v. Southern*, 9 A. E. 895; *Harman v. Anderson*, 2 Camp. 243.)

A course of decision originated in the case of *Dixon v. Baldwin*, (5 East. 175,) although it is by no means necessarily involved in the facts contained in the statement of that case, which bears more closely upon the case under consideration, and which may be said to have resulted in the decision of *Valpy v. Gibson*, (4 Man. Gr. & Scott, 837,) upon which the defendants here now mainly rely.

It was held, in *Dixon v. Baldwin*, that the arrival of the goods to the possession of agents, for shipment, who held them awaiting the orders of the vendees, terminated the right of stoppage, and the language of Lord Ellenborough furnishes the argument used in the subsequent cases, and relied upon in the present, viz.: "The goods had so far gotten to the end of their journey that they waited for new orders from the purchaser to put them again in motion, to communicate to them another and substantive destination, and that without such orders they would continue stationary." But it should be noticed that the vendors there resided at Man-

chester, the vendees at London. The goods were ordered to be sent to the agents of the vendees at Hull, and though "for Hamburg," yet the agents had no orders when nor to whom to send the goods, but, as testified, held the goods for the vendees and at their disposal, and accordingly Le Blanc, J., gives as a reason for his opinion that "until the agents received directions from the vendees they did not know where to send the goods." The goods were not in the hands of the agents for the purpose of being sent or delivered to the vendees, but to be shipped from them, and to whom was not yet known.

Without pausing here to consider how far this case conflicts with the decisions of our own courts, it is proper to say that the facts proved there are very materially different from those disclosed in the present case, where the agents received the goods for shipment to the vendees themselves, at the place designated to the vendors at the time of the purchase, and held them for no other purpose, awaiting merely directions which should designate the time of shipment.

This case was followed by *Rowe v. Pickford*, (8 Taunt. 83,) which held the right of stoppage at an end, when goods, ordered from Manchester by a vendee in London, arrived at the wagon office of the carrier in London and on notice to the vendee, he having no warehouse, his clerk went to the wagon office, (where goods sent to the vendee always remained till shipped,) and saw the goods, and informed the warehouseman that he should give an order to the vendee's shipping agent to come for them as usual. Of this case it may be remarked that the ground of decision is, that by the uniform course of business, the vendee had made the warehouse his own, and the acts of his clerk amounted to an actual acceptance of the goods and a deposit there for safe keeping; and, what is very important, no other destination than London was ever communicated to the vendor or contemplated by him, and the decision in *Groning v. Mendham*, (1 Stark, 299,) where the vendor shipped the goods "to the order of the vendee," and delivered him the bill of lading, proceeds upon this latter view of the subject.

Accordingly, where goods were purchased by commission agents at Manchester, for a house at Lisbon, and the vendors at Manchester delivered the goods to the agents for the purpose of

being forwarded, the goods were held liable to stoppage so long as they remained at the warehouse of such agents. (*Coates v. Railton*, 6 Bem. & Cres. 422.)

This case is not unlike some others above cited, but the three more recent cases above referred to, were discussed, and the general principle reasserted, that where goods are sold to be sent to a particular destination named by the vendee, the right of the vendor to stop them continues until they arrive at that place of destination. The suggestion that the time or mode of shipment not being fixed made any difference, does not appear to have occurred to the court; and, after reviewing the cases, it is added, "the principle to be deduced from these cases is, that the *transitus* is not at an end until the goods have reached the place named by the buyer to the seller as the place of their destination."

It is difficult to perceive, if the mere fact that the goods are awaiting the directions of the vendee, as to the time or mode of conveyance, affects the right of stoppage, why the full possession of an agent clothed with authority to determine in future where and how the goods shall be sent should not have the same effect. And that the mere fact that the goods await the vendee's orders for disposition even, (which is much stronger in favor of the vendee than where the orders required relate only to the time or mode of shipment to the vendee,) does not defeat the vendor's right, is held in *Tucker v. Humphrey*, where the uniform course of business of the vendee with the carrier was, that the latter retained goods sent to the vendee on board ship or on his wharf until the vendee sold them, and yet they were stopped on board the ship while awaiting orders. And the court evidently entertain the doctrine that where the person to whose possession the goods have come is acting merely as a means of conveyance to or on account of the vendee in a course of transit towards him, the right of stoppage is not lost. (4 Bing. 516.)

Goods in the hands of the middleman are, in one sense, always subject to the orders of the vendee, as well before as after arrival at their place of destination. He may take possession of the goods, and he may, if he please, terminate the transportation at an intermediate place; or he may change the ultimate destination. But if, in fact, he has done neither, and the goods are held for the mere purpose of shipment to him, it is not apparent that the

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existence of the right or power of the vendee unexercised, and while the purpose to ship to the destination named to the vendor continues, ought to affect the right of the latter. And that such right is not so affected, if the time and mode of shipment be in the discretion of the agent to whose care the goods are sent by the vendor, appears to have been held in *Nicholls v. Le Feuvre*, (2 Bing. N. C. 81,) and, notwithstanding the qualifying dictum of Chief-Justice Tindal, founded on *Dixon v. Baldwin*, the case of *Jackson v. Nichol*, (5 Bing. N. C. 508,) seems even stronger to this effect.

The question before us, then, becomes an exceedingly narrow one; goods are purchased for a specified destination, named to the vendors at the time of the purchase, and that destination is the place of business of the vendees. For the single purpose of being shipped to that destination the vendors send the goods to the vendees' shipping agents, who, during a long course of dealing, had been in the habit of receiving and forwarding goods to the vendees. The destination remains unchanged. The vendees not only do nothing to change the condition or destination of the goods, but their very purpose for which the goods were bought remains unaltered. The goods have neither become the subject of any new adventure by the vendees nor the basis of any new credit with third persons. If such shipping agents were clothed with a general discretion as to the time and mode of shipment, the right of stoppage *in transitu* would continue until and after such shipment. Does the fact that, as respects the time of shipment, (for that appears to have been all that was left for the orders of the vendees, as the parties contemplated and treated the present transaction,) the agents were to await the orders of the vendee, defeat the right?

Chief-Justice Tindal, in the case last above cited, remarks, as the doctrine of *Dixon v. Baldwin*, that "if the goods had been delivered to an agent of the vendee to remain till he received orders for their ulterior destination, the right to stop would have been at an end." The case of *Dixon v. Baldwin* has been already noticed above, and it may be added of this remark, that if "orders for their ulterior destination" is taken to mean, for disposal as the vendees might order, then the dictum does not bear upon the question above stated. In such case it could not be said that they were purchased or delivered by the vendors for any other desti-

nation. It must, however, be conceded that the language of the court in the modern English cases go very far to sustain an affirmative answer to the question above proposed, and yet no one of the cases themselves necessarily involves such an answer.

The three recent cases, much insisted upon by the defendants' counsel, are *Dodson v. Wentworth*, (4 Man. & Gr. 1080,) *Wentworth v. Outhwaite*, (10 Mees. & Wels. 436,) and *Valpy v. Gibson*, (4 Man. Gr. & Scott, 837).

In the first of these cases it was held, that when goods arrived at the place designated in the bill of lading, and were delivered by the carrier to the warehouseman, a third party who was in the habit of receiving goods for the vendee, and holding, at his risk, without charge, till fetched away by the vendee or delivered to others upon the vendee's orders, the vendor's right of stoppage ceased on such delivery to the warehouseman.

In this case, the goods reached the destination to which they were ordered at the time of the purchase, and no other destination appears to have been named to the vendor, or to have been contemplated by him. The course of business proved did not indicate that the goods were to be forwarded any further; the warehouseman held subject to the orders of the vendee as to delivery to any persons whom he might designate; under the circumstances, the court regard the usage of the vendee as making the warehouse his own, and delivery there, therefore, as effectual as if the delivery had been in his own warehouse. The court regard the case as falling within the principle of *Dixon v. Baldwin*, already commented upon. In *Wentworth v. Outhwaite*, (10 Mees. & Wels. 436,) the facts were substantially the same as in *Dodson v. Wentworth*, with the additional circumstance that the vendee had actually taken away a portion of the goods.

The case of *Valpy v. Gibson* is, in some of its features, very nearly identical with that now under consideration; some grounds of discrimination may be stated, though it cannot be denied that the opinion expressed by the court is adverse to the claim of the present plaintiff. They seem inclined to hold, that if the agent to whose hands the goods come cannot forward without further directions from the vendee, the *transitus* is at an end when the goods are received by him, although purchased for another destination and expressly forwarded by the agent to be shipped.

In that case, however, goods were purchased by Brown, living in Birmingham, for the Valparaiso market, and the vendors, in accordance with Brown's directions, sent the goods to L. H. & Co. of Liverpool, and on the same day advised L. H. & Co. that they were for shipment to Valparaiso, and requested them to put certain patterns on board with the goods, and "see that they are properly directed as Mr. Brown of Birmingham may direct the same to be shipped."

Had the case stopped here, it would have differed very slightly from the present. The only variation being, that in this case the goods were on their way to the vendee, while in that, they were on their way from the vendee to a foreign market. And the court clearly intimate the opinion, that upon these facts alone the *transitus* ended when the goods were received by L. H. & Co., the shipping agents.

But the further facts in that case, upon which, in connection with those stated, the decision was really based, create a most material difference, and bring the decision upon the ground of an actual exercise of authority over the goods by the vendee, and, like many of the previous cases of that description, does not at all conflict with the plaintiffs' claim here. After the goods had been put on board ship, another agent of the vendee (acting, as the court assume, under his authority) caused them to be re-landed and sent back to the vendors to be re-packed. This was deemed by the court an actual dealing with the goods as owner; it diverted them, for the time being, from the course of transportation, and brought the transaction within the ordinary case of goods sent to a packer's for re-packing, as in *Leeds v. Wright* and *Scott v. Pettit*, above referred to, and "this," the court say, "would certainly put an end to the *transitus*, even if it had not been determined, as we think it was, by the original delivery to L. H. & Co."

It is undoubtedly true, that in the last three cases, though none of them necessarily called for any such proposition, the court seem not only to adopt the language of Lord Ellenborough, in which he deems the *transitus* at an end because "the goods had so far gotten to the end of their journey that they waited for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, without which orders they would continue stationary;" but they seem to sanction the even

more restricted rule, that if any further orders from the vendee are necessary to put the goods in motion, the *transitus* is at an end, although the actual destination named to the vendor remains unchanged, and the agents receive the goods to be forwarded to the vendee at such place, and for no other purpose.

As already remarked, neither *Dixon v. Baldwin*, nor either of the cases referred to, called for any such narrow limitation upon the vendor's right of stoppage, and it does not appear called for by any reason, or even by any rule of convenience. The right in question is constantly called an equitable one, and is declared to be entitled to favor. It is equitable, because a condition of things has arisen not contemplated by the parties at the time of the purchase, and which, if anticipated, would have prevented a delivery without payment. The vendee has not paid the price, and, therefore, as between him and the vendor, the equity of the latter to retain the goods is clear. The rights or equities of no third persons have intervened. Creditors who have not become such upon the credit of the goods, nor of the vendee's possession, have no right in reason or equity to ask that the goods be applied to the payment of their debts; no one, therefore, is prejudiced by the recognition of the vendor's right. It is sometimes characterized as an extension of the vendor's lien upon the goods for the price or purchase-money. It is not apparent that the circumstance that the goods are temporarily stayed in their actual progress to the vendee at the place of destination in fact, until he shall give orders as to the mode or time of shipment, upon any view of what is equitable between vendor and vendee should affect the vendor's right; and as to third persons, the circumstance can in nowise affect them.

The supposed rule concedes that if the shipping-agent is already clothed with authority to ship when the goods arrive, then his possession is to be deemed a part of the transit. And to say that, although he hold for that, and no other purpose, and does, in fact ship, in execution of the declared intent expressed to the vendor by the vendee, the vendor's right is lost, because the agent was instructed to await orders touching the mode or time of shipment does not seem to "regard with favor" the right in question, but rather to restrict that right within limits more narrow than sensible or just,

If Edwards, Sandford & Co., the agents at Liverpool, had been clothed with a discretionary power to ship the goods to this port by any vessel they might think proper to select, but circumstances occurred inducing them to decline acting under that discretion, and being unwilling to make a selection, they had written to the vendees for specific instructions, it would hardly be contended that by this act of the agent the *transitus* was terminated, and yet, in the case supposed, the goods, until an answer was received, would have been awaiting the orders of the vendees, and requiring such orders to put them again in motion in exactly the same sense as in the actual case before us.

And again, if the goods had been sent to Edwards, Sandford & Co. precisely as they were, in fact, save only that the orders as to the time and mode of shipping the goods to New York which they were directed to follow were to come from the vendee's agent to purchase in England and forward to this port, could it have been said, that by the arrival of the goods in Liverpool for shipment before these instructions were received from the agent the *transitus* was ended, and the right of stoppage gone? And yet, looking to the actual course of dealing, and the intention of the parties, the case stated does not differ in principle from the present. For, although the instructions required for the guidance of Edwards, Sanford & Co. were to come from J. & J. Hall of Nottingham, yet, in giving those instructions, they acted for Hall Brothers of New York in furtherance of the original design and purpose for which the goods were bought, and to carry that design into execution by forwarding the goods to their original and proper destination.

And, although it may be conceded that John Hall at Nottingham, being a partner, had legal power even to change the destination of the goods, he not only did not do, nor attempt to do this, but his doing so would have been a departure from the understanding and arrangement by which the goods were, in fact, bought for the New York house, and it may be even a violation of duty to his partner in New York, and the reference to him for instructions, and the instructions he gave were, therefore, only in aid of the original design to forward to the New York firm, in respect to whom, in giving the instructions, he may properly be regarded as their agent only.

It has sometimes been said, in relation to this subject, that each case must depend upon its own peculiar circumstances, and involves the inquiry what was the intent of the parties and whether the vendor contemplated any further actual reduction of the goods by the vendee to his own possession, and by this view many of the above cases may be disposed of, where it appears that the agent held not for transmission to the vendee but for shipment from him, or generally for disposal as the vendee might direct; and, notwithstanding the language used in the recent English cases, and applied to a state of facts in material particulars different from the case before us, it is by no means clear that they would hold that the possession of the agents in the circumstances of this case terminated the *transitus* at Liverpool.

Delivery to the vendees, and at New York—named to the vendors at the time of the purchase—was in contemplation of the parties from the outset. That destination was impressed upon the goods in the very act of manufacturing. That destination was constantly the intent of the vendees. The agents at Liverpool held them only in furtherance of that design, and made the shipment in order to its accomplishment.

If, therefore, we had only the English cases to guide us to a proper determination of ~~this~~ cause, there are strong reasons for holding that the more liberal views found in the earlier cases should determine the case favorably to the plaintiffs' claim. If it were otherwise, it should be remembered that the most recent cases are only binding upon us so far as we are satisfied that they truly exhibit the law as it was when English authorities ceased to be binding in this country.

Our attention is called to the very recent case of *Biggs v. Barry*, in the United States Circuit Court for the district of Massachusetts, etc., (2 Curtis, C. C. R. 279,) of which it is stated by counsel that the facts disclosed by the evidence were identical with the present case so far as the plaintiffs' right to stop the goods for non-payment of the price was involved, and in which Mr. Justice Curtis held that the *transitus* was at an end when the goods were received by Edwards, Sandford & Co. in Liverpool. The case, as reported, does not show that the goods were, in that case, ordered for the Boston market, nor that Boston was at all named to the vendors as their destination, nor that the goods were sent to Edwards, Sandford &

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Co. for shipment to Boston, awaiting only orders respecting the time or mode of shipment. On the contrary, the charge of the court to the jury seems to imply that the goods were sent to Edwards, Sandford & Co. "to await orders respecting their destination." But if a more full detail of the facts proved would show a more precise correspondence, then we feel constrained to differ from the conclusion reached by the learned Justice of the Circuit Court. His opinion is briefly placed upon the authority of *Valpy v. Gibson*, above referred to, and although it would be matter of regret if in the two chief commercial states of the union a conflicting rule should prevail upon this subject, the views above expressed, even without the decisions in our own state, to be presently noticed, which are binding upon us, lead us to the opposite conclusion.

We are not, however, without the aid of decisions in this country. It will suffice to notice those in our own state, bearing directly on the subject, and it will be seen that some of the recent English cases, so far as they conflict with the plaintiffs' claim, are directly contrary to our own.

In *Buckley v. Furniss*, (17 Wend. 504; S. C. 15 Wend. 137,) it appeared that the vendor, at Troy, received an order for iron from the vendee, residing at Malone, which, in accordance with the direction contained in a former order, was forwarded to the care of one Green, at Plattsburg, at whose warehouse it was received and deposited, and it there remained until the vendee sent his own carrier to Plattsburg for the iron, and it was delivered from the warehouse to him, a portion of the goods were actually carried and delivered to the vendee. Before the carrier reached Malone with the residue of the goods they were attached by a creditor of the vendee, and were thereby detained, and the vendor, in exercise of the right of stoppage *in transitu*, claimed such residue of the goods, and his claim was sustained by the court.

In *Hitchcock v. Covill*, (20 Wend. 167; S. C. in Error, 23 Wend. 611,) the vendor in New York sold goods to a vendee residing in Willardsburg, Pa., and, by the vendee's direction, forwarded the goods to Havana, where they were deposited in a warehouse. There being no forwarding line at that point, the course of business was to deposit goods in warehouse, and the warehouseman kept them until called for or ordered on by the owners. By these

facts a state of things strikingly like those before us was established. The goods were in the possession of a warehouseman, entirely subject to the orders of the vendee. The goods "had so far gotten to the end of their journey that they waited for new orders from the purchaser to put them again in motion, without which orders they would continue stationary."

Upon the authority of *Dixon v. Baldwin*, and some of the other cases above referred to, the Supreme Court were inclined to the opinion that the *transitus* was at an end when the goods were received by the warehouseman; and when another fact was taken into view, which also appeared in the case, there was said to be no doubt about it. The additional fact was this, that after the arrival of the goods at the warehouse the vendee came in person to Havana, with his team, to take the goods to his residence, and, as the court suggest, would have taken them into his actual possession, but finding that one of his creditors had caused an execution to be levied on the goods, left them there. In the court of errors, however, the decision of the case is put exclusively upon the ground that, notwithstanding all the facts stated, the *transitus* was not at an end. The goods being, in fact, in course of transportation to the vendee, the circumstance that they remained with the warehouseman, subject to the vendee's orders, and that they waited for such orders to put them again in motion, was held not to defeat the vendor's right to stop the goods.

In the present case, therefore, it must be held, that the plaintiffs' right to stop the goods did not end on the arrival of the goods at Liverpool.

It is next insisted that the goods having arrived at the port of New York, and having been assigned by the vendees to the defendants for the benefit of creditors, and having been by the defendants entered at the custom house, before notice to the defendants of the plaintiffs' claim, the *transitus* was at an end and the right of stoppage lost.

In relation to the effect of the assignment by the insolvent vendees to trustees for the payment of debts, it will suffice to say, that the defendants are not *bona fide* purchasers for value. In very many of the English cases above referred to, in which the right of the vendees to stop the goods was sustained, the claim was resisted by assignees in bankruptcy, who were deemed in no

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better condition than the vendee himself in this respect. And in *Buckley v. Furniss*, above cited, the fact appeared, that previous to the exercise of the right of stoppage, the vendee had assigned his property to the defendant and other creditors, and yet it was held that this did not affect the vendee's right. So also in some of the English cases, and in *Buckley v. Furniss*, the property had been attached; and in *Hitchcock v. Graves* an execution had been levied thereon at the suit of a creditor of the vendee. This, however, was not deemed to make any difference.

As to the effect of the defendants' entry of the goods at the custom house, the case of *Northey v. Field*, (2 Esp. 240,) shows that this would not defeat the right in England, if removal to the king's stores be tantamount to an entry at the custom house in this country. The case submitted does not distinctly show whether the defendants' entry was before or after the plaintiff's demand of the goods from the carrier and officers on board the ship, but only that it was done before the defendants were notified.

Be this as it may, the case of *Mottram v. Heyer*, in the court of errors, (5 Denio, 629,) is conclusive upon us on this question. That case was, in the fact, that the vendee had not only entered the goods, but had received the bill of lading from the carrier and had paid the freight; stronger than the present in the defendants' favor. And in the court below, such entry and the payment of freight were deemed such acts of ownership and termination of the carrier's title to retain as put an end to the *transitus*. (2 Leg. Obs. 25; 1 Denio, 483.) But the Court of Appeals, although they affirmed the judgment on the ground that the vendor's right was not properly exercised, held, so far as we can learn from the opinions delivered, that the *transitus* was not at an end, and that the right might have been asserted and maintained, had the proper claim been made on the carrier.

The plaintiffs should have judgment upon the verdict.

MARY ANN GRAHAM v. OWEN DUNNIGAN.

Although a defendant whose answer is demurred to, may, as a general rule, assail the complaint as not containing facts sufficient to constitute a cause of action, it is doubtful, whether the rule applies where the demurrer is merely to a counter-claim, which, although contained in the answer, forms no part of the defence that the answer sets up.

Where a tenant in dower, to whom, as such, certain apartments in a dwelling-house have been assigned, has been compelled for the protection of her life estate, to pay the taxes on the whole building, she is entitled to recover against the tenant occupying the rest of the house such an amount of the taxes so paid as may be justly apportioned to that part of the building that such tenant occupies.

There is no force in the objection, that there is no contract by the defendant to pay the sum demanded. This law implies a contract by the defendant to repay his just proportion of the taxes, as so much money paid for his use.

The court held the counter-claim to be bad, for reasons applicable only to the special circumstances of the case.

Judgment sustaining demurrer to counter-claim affirmed with costs.

(Before HOFFMAN, SLOSSON, and WOODRUFF, J.J.)

Heard, January; decided, March, 1857.

APPEAL by defendant, from a judgment at Special Term for plaintiff upon her demurrer to a counter-claim, set up in the defendant's answer.

H. Brewster, for defendant, appellant.

W. G. Brown, for plaintiff, respondent.

BY THE COURT. WOODRUFF, J.—On the argument of the appeal herein, it was urged on behalf of the appellant, that whether the counter-claim demurred to is sufficient as set out in the answer or not, the defendant is entitled to judgment upon the demurrer, on the former and familiar rule, that on a demurrer to the defendant's pleading, he is at liberty to go back to a previous pleading of the plaintiff, and if that be bad, he is entitled to judgment, although his own pleading be also defective, and that a bad plea is good enough in response to a bad declaration; he there-

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fore insists that the complaint herein does not state facts sufficient to constitute a cause of action.

Whether the rule referred to can avail the defendant in any case it is unnecessary to say. Many defects in a complaint, if not insisted upon by demurrer to the complaint itself, are waived for all purposes. But it is provided expressly, that if the complaint does not state facts sufficient to constitute a cause of action, that defect is not waived though not insisted upon by way of demurrer. If we did not think it quite clear that the objection itself is without foundation, we might deem it material to inquire in what manner and in what stage of the action it should be taken advantage of, and whether it could be urged to defeat the plaintiff's demurrer to the defendant's counter-claim, but we prefer to content ourselves with the conviction that the complaint is not liable to the objection.

The complaint shows that the defendant, on or about the 25th of April, 1852, became the owner in fee of a certain house and lot, certain apartments in which had been adjudged and set off to the plaintiff in December, 1851, as and for her dower in the premises; and that the plaintiff, for the protection of her life estate in those apartments, has been compelled to pay the whole of the taxes, etc., on the said house and lot since the said 25th day of April, 1852, while the defendant has been in the possession of the residue of the premises, and in the receipt of the rents and profits thereof.

There is no doubt, that upon these facts, a cause of action has arisen in favor of the plaintiff for the reimbursement to her of so much of such taxes, etc., as is properly to be apportioned to that portion of the premises in the defendant's possession. The plaintiff has paid money for the use of the defendant. She was compelled to pay it for the protection of her own life estate in the portion of the house which she occupied.

The ground of objection stated by the defendant's counsel, is, that the complaint shows no contract by the defendant to pay, and no breach of any contract. The answer to this is, that in such case the law implies a contract by the defendant to pay his just proportion. Here is a contract as truly as in other cases where one pays money for the use of another by his request.

It is further insisted, that the complaint does not state what

portion of the premises are in the defendant's possession, nor that any specified portion is in his possession.

To this the reply is obvious. The complaint does state that the fair and equitable portion of the taxes, etc., properly chargeable upon the defendant's portion of the premises is \$200. If the defendant desired that the complaint be made more definite and certain, he should have applied by motion. The substantive ground of the plaintiff's claim, and the facts which show her title are averred, and whether the complaint be regarded as seeking an apportionment of the taxes and a judgment that the defendant reimburse to her his just proportion, or as in the nature of a declaration for money paid to the defendant's use, the essential facts to constitute a cause of action are stated.

The demurrer to the defendant's counter-claim rests upon its alleged insufficiency, and in considering it, we must take the facts alleged in the complaint, or, at all events, those which are not inconsistent with the averments in the counter-claim as admitted, and the counter-claim under those admissions stands thus:—

The husband of the plaintiff died, seized of the premises, (including the house and lot, before rented, and the adjoining house,) on the 11th day of May, 1848. On the 20th of June, 1851, one Charles Sterling was, by an order of this court, appointed receiver of the rents and profits of all the property and premises in the complaint described, and the order for his appointment directed him to pay the taxes, assessments, and interest on certain mortgages upon the premises, and certain other costs, charges, and annual expenses.

On or about the 26th of December, 1851, the plaintiff's dower was set off to her, by assigning to her use a part of the corner house and lot.

At some time prior to April 26th, 1851, the heirs-at-law conveyed the property to one James Linden, and on that day he conveyed all his right, title, and interest therein to the defendant, and she has paid all the taxes, etc., on the corner house and lot since that time.

The defendant alleges that the plaintiff paid no rent to the receiver, and that such receiver was compelled to pay taxes, etc., on the corner house out of the rents collected by him "out of other property belonging to the defendant," when the defendant was

receiving the rents and profits of the corner house and paid no taxes, etc., thereon. That the sums so paid by the receiver amount to \$200, which, it is added, "the plaintiff owes the defendant in his own right as the owner in fee of property, and assignee of James Linden the former owner of the premises, described in the complaint herein, the same has been assigned to the defendant by the said Linden for a valuable consideration duly paid, etc.

We might dispose of the demurrer to this counter-claim by saying, that we fully concur in the opinion given by Mr. Justice Bosworth, on sustaining the demurrer at Special Term. We may, however, add, it in nowise appears in what suit the receiver was appointed, nor who were the parties thereto. If it be true that the order appointing the receiver directed him to collect the rents of the premises and pay the taxes, etc., which he paid, we must assume that the order was rightly made, and that it was based upon equities existing between the parties to the suit, whoever they were, which made it proper that he should pay such taxes, etc., out of the rents collected.

If the receiver collected rents from property not embraced in the order, and if that is what the defendant means by "other property of the defendant," the receiver is responsible, and the defendant should seek redress from him.

It does not appear that when the receiver collected the rents and paid the taxes, either James Linden or the defendant had any interest in the premises described in the complaint, and if not, they had no interest in the rents collected therefrom. It in nowise appears that the plaintiff was liable to pay rent to the receiver for the premises assigned to her for her dower.

It does not appear that prior to the assignment of her dower she occupied the corner house, and if she did, the adjustment of the taxes, etc., was, for aught that appears, a matter between her and the heirs-at-law, with which neither Linden nor the defendant had any concern.

And we must, moreover, assume that the powers and duties of the receiver, and his acts in his receivership, were under the direction of the court, and that all the rights and equities of the parties affected thereby were properly adjusted and determined by the court in the suit in which he was appointed. If he made any

misappropriation of moneys received by him, the party who was injured should seek redress from him.

If we could find, in the facts alleged, any ground for a claim in favor of James Linden, it would at least be doubtful whether there is any sufficient averment of an assignment of such claim to the defendant. The words, "the same has been assigned to the defendant," etc., in the connection in which they stand, seem rather to refer to the premises than to any such claim for money due Linden.

It may not be difficult to point out other defects in the supposed counter-claim, but enough have been suggested to warrant the conclusion, that the order appealed from must be affirmed, with costs.

CATHARINE W. JOHNSON, executrix v. THE HUDSON RIVER
R. R. Co.

Although, as a general rule, "ordinary prudence" is all that can be exacted from a railroad company in respect to passengers on the same road, yet the rule is not to be understood as meaning that only the same degree of care is to be required in all cases.

The only safe interpretation of the rule is, that the company is bound to use a degree of care and vigilance, to prevent accidents and injury to others, which is proportioned to the dangerous character of its business, and of the mode and means of conducting it.

The true rule may, therefore, be stated in these words: The degree of vigilance which the law exacts in its requirement of ordinary care, varies with the probable consequences of negligence, and also with the command of means to avoid injuring others possessed by the person on whom the obligation is imposed.

Held, that applying this rule to the facts in evidence before him, the Judge, upon the trial, properly instructed the jury that, considering the nature of the business in which the defendants were engaged, and the hazards attending the running of cars in the streets of the city, particularly on a dark night, they were bound to use the utmost care and diligence, and for the purpose of avoiding accidents endangering life, were bound to use all the means and measures of precaution that the highest prudence would suggest, and which it was in their power to employ, and that if the use of bells and lights upon the cars was a measure by which disastrous accidents would probably be avoided, the omission to use them, if proved to the satisfaction of the jury, was culpable negligence, and it was for the jury to say whether to this negligence the fatal accident which had given rise to the action might not justly be imputed.

Held, therefore, that applying to the defendants the true rule of ordinary care, the Judge, under the circumstances detailed in the case, could not have required

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from them a less degree of diligence and prudence than that which he laid down as the measure of their obligation.

The defendants' counsel insisted that the Judge erred in leaving the jury to determine whether the defendants should have carried lights or bells instead of determining, as a question of law, whether such use of lights or bells was exacted from the defendants in the exercise of ordinary care.

Held, that there was no error on the part of the Judge, that he did determine the question of law, namely, that the prudence exacted of the defendants was that which, in view of the hazardous character of their business, would tend to diminish the danger of accidents, and that he properly left to the jury, as a question of fact, whether the use of lights or bells was a measure of that character.

The Judge charged the jury, that the deceased person, whose death was attributed to the negligence of the defendants, was bound to exercise only ordinary care; and he defined that care as the care and foresight which men of ordinary prudence are accustomed to employ, and which, placed in like circumstances, they probably would have employed.

Held, that there was no error in this instruction to the jury.

Held, that the Judge properly refused to charge the jury, that the manner in which the deceased was found on the track of the railway, without any explanation as to how he got there, was presumptive evidence of negligence on his part.

It appeared on the trial that the deceased was a young man, between the ages of thirty and forty, and in good health, and the Judge charged the jury, that the probable continuance of his life was at least twenty years.

Held, that the expectation of life is a known scientific fact, to which a Judge, upon the trial of a cause, has the same right to advert as to a known historical fact, and as the expectation of life between the ages of thirty and forty is known to exceed thirty years, there was no error in the charge of the Judge.

Judgment for plaintiff affirmed, with costs.

(Before DUER, SLOSSON, and WOODRUFF, J.J.)

November 20, 1856; March 21, 1857.

APPEAL by defendants from a judgment at Special Term in favor of the plaintiff for \$4,456.18, damages and costs.

The action was brought by the plaintiff as executrix of the last will, etc., of her deceased husband, Peter A. Johnson, and the complaint averred that his death was occasioned by the culpable negligence of the defendants or their servants, and demanded judgment for \$5,000 as the pecuniary loss to his widow and children.

The answer denied the negligence imputed, and averred that the fatal accident was solely owing to the negligence of the deceased himself.

The cause was tried before Duer, J., and a jury, at a Trial Term in January, 1856.

It appeared on the trial, that on the night of the 28th of August, 1853, the deceased was run over by a freight car of the defendants' on the track of their road in West street at its intersection with Gansevoort street, in the city of New York, and that he died shortly thereafter, solely in consequence of the injuries and wounds which he then received.

It also appeared that the night was very dark, and it was, in effect, determined by the verdict of the jury, that there were no bells on the horses nor lights on the car.

It is needless to state more particularly the evidence given on the trial, or any of the exceptions taken in its progress, since the argument at General Term was confined entirely to the exceptions that were taken to the Judge's charge.

When the testimony was closed, he charged the jury "That there were two questions which the jury, in the first instance, must consider, and both of which must be determined in favor of the plaintiff to entitle her to recover.

These were—1st, Whether the accident, which resulted in the death of the deceased, was owing to the negligence of the defendants or their servants?—and, 2d, Whether there was any negligence on the part of the deceased that directly contributed to the accident? If both these questions were determined in favor of the plaintiff, the next question would be what sum, not exceeding that limited by the statute on which the action was founded, ought to be awarded to her as damages. That it was the exclusive province of the jury to decide these questions; and that his duty was limited to a statement of the rules of law by which their deliberations ought to be governed. That the negligence imputed to the defendants was, that there were no bells on the horses to warn persons of the approach of the car, and no lights on the car to enable the driver to see the track in front of his horses; and that he was driving more rapidly than was consistent with ordinary prudence. That it was his, the Judge's, duty to instruct them, that considering the nature of the business in which the defendants were engaged, and the hazards attending the running of cars in the streets of the city, and particularly on a dark night, they were bound to exercise the utmost care and diligence; and for the purpose of avoiding accidents endangering property and life, were bound to use all the means and measures of precaution that

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the highest prudence would suggest, and which it was in their power to employ.

To which opinion and proposition, the defendants, by their counsel, did then and there except.

Hence, if the use of bells and of lights was a measure that the prudence and foresight they were bound to exercise ought to have suggested, and if by such use disastrous accidents would probably be avoided, the omission to use them, if proved to the satisfaction of the jury, was culpable negligence; and it was for the jury to say, whether to this culpable negligence the fatal accident that had given rise to the action might not justly be imputed.

To which opinion and proposition, the defendants, by their counsel, did then and there except.

That it appeared to him, for divers reasons, that the driver of a car at night ought to be enabled to see whether there were any obstacles or persons on the track in front of him; and if the light afforded by the lamps in the street was not sufficient for that purpose, the use of lamps on the car seemed to him a necessary precaution.

To which opinion and proposition, the defendants, by their counsel, did then and there except.

It was not to be supposed that the driver of the car had seen deceased on the track, and had wilfully run over him.

To which opinion and proposition, the defendants, by their counsel, did then and there except.

It was more probable, that from the want of light he could not see in front of his horses; or, if there was sufficient light, that his attention was directed another way; and, upon either supposition, there was negligence, to which the accident might reasonably be imputed.

To which opinion and proposition, the defendants, by their counsel, did then and there except.

That according to the testimony of the witnesses of the plaintiff, there were neither bells on the horses, nor lights on the car, when the accident happened, and that the jury had a right to take into consideration the fact that none of the servants of the defendants who were on the car, neither the conductor nor driver, nor brakeman, had been called as witnesses for the defence, and as their absence had not been explained, it was a reasonable presumption

that, if called, they would not have contradicted materially the witnesses of the plaintiff.

To which opinion and proposition, the defendants, by their counsel, did then and there except.

The Judge next said, that although the jury might be satisfied that there was culpable negligence on the part of the defendants, still the plaintiff would not be entitled to recover, if the jury believed, from the evidence, that there was any negligence on the part of the deceased that directly contributed to the accident. Certainly he would not have been killed had he not been on the track of the railroad, and if his being there, as seemed to be contended, was conclusive proof of negligence, there was an end to the action. He certainly had not seen or heard the approach of the car in time to make his escape, and if this fact was alone sufficient to bar a recovery, no action like the present, however gross and culpable the negligence of a railroad company, could ever be maintained. It would be a sufficient answer to the plaintiff to say the deceased was on the track of the road, and, therefore, perished by his own rashness and folly.

To which opinion and proposition, the defendants, by their counsel, did then and there except.

The Judge then said that, in his opinion, this was not a conclusion that the jury were bound to draw, the deceased was bound to exercise ordinary prudence and no more, and the question the jury were to determine, was whether it appeared from the evidence that there had been a want on the part of the deceased of that care and foresight that men of ordinary prudence are accustomed to employ, and which, placed in like circumstances with the deceased, they probably would employ, and in judging of the conduct and motives of the deceased, they were bound to consider all the circumstances of the case as they had been established by the evidence.

To which part of said charge, the defendants then and there duly excepted.

The defendants specially excepted to the phrase, "this was not a conclusion the jury were bound to draw."

The defendants also specially excepted to the instruction that "the deceased was bound to exercise ordinary prudence and no more, and the question the jury were to determine was, whether

it appeared from the evidence that there had been a want on the part of the deceased of that care and foresight, that men of ordinary prudence are accustomed to employ, and which, placed in like circumstances with the deceased, they probably would employ, and in judging of the conduct and motives of the deceased, they were bound to consider all the circumstances of the case as they had been established by the evidence."

1. As to that part of the charge relating to the degree of prudence the deceased was bound to exercise.

2. As to that part of the charge stating the question the jury were to determine, and the question submitted to the jury.

3. Because, if otherwise correct, it was calculated to mislead the jury. First, in the use of the word "probably," and second, in the use of the words "placed in like circumstances," which tended to make intoxication, or sleep of the deceased, an excuse for the want of care.

The Judge then stated the evidence bearing upon this branch of the cause.

On the question of damages, the Judge said, that if the jury should be of opinion, that the plaintiff was entitled to recover, they could give no other or greater damages—not exceeding \$5000—than would be sufficient to compensate the pecuniary loss which the widow and children had sustained from his death. There was no certain mode of estimating this loss, as it consisted entirely in a deprivation of the support and maintenance which they would have derived from him had he continued to live, and the question of its amount was therefore one not of positive calculation, but of mere probability. The deceased was a young man, in good health, and the probable continuance of his life was at least twenty years.

To that part of said charge which speaks of the probable duration of the life of the deceased, the defendants then and there duly excepted.

During this time it was reasonable to believe that his wife and his children, during their minority, would have been supported by him; and the jury would, therefore, give such damages as in their judgment would be a full compensation for the loss of this support, and no more.

The said defendants, by their counsel, asked the said Justice to

charge the jury, that the fact that the manner in which the deceased was found on the track, without any explanation as to how he got there, was *prima facie* evidence of negligence on his part. The said Justice refused so to charge, and to such refusal the said defendants, by their counsel, did then and there except.

The said defendants, by their counsel, asked the said Justice to charge the jury, that the defendants were not bound to carry bells on their horses when drawing their cars.

The said Justice refused so to charge, and to such refusal the said defendants, by their counsel, did then and there except.

The defendants, by their counsel, further requested the said Justice to charge the jury, that the defendants were not bound to carry lights on their cars when being drawn by their horses through the streets. The said Justice refused so to charge, and the defendants' counsel excepted to the refusal.

The jury found a verdict for the plaintiff, and assessed her damages at \$4000.

Fullerton, for defendants, appellants.

J. Morrison, for the plaintiff.

BY THE COURT. SLOSSON, J.—On the 28th day of August, 1853, at about 8 o'clock in the evening, the deceased, (Peter A. Johnson,) was run over by a freight car of the defendants', in West street, at its intersection with Gansevoort street, and killed.

The day had been rainy, and the evening was very dark. The verdict of the jury determines that there were no bells on the horses nor lights on the car.

The deceased was a cartman, and was on his return home in the evening, driving up on the east side of the track; a sewer was in the process of construction through Gansevoort street, it had extended across the track in West street; but at the time of the accident, it had been so far completed, as that it had been arched over on the west side to about the middle of the track, while on the east side it was open, so that no vehicle going north could pass on that side beyond the south line of Gansevoort street, at which point there was a mound of earth and some barrels which had been placed there to prevent any attempt at a passage.

A temporary bridge had been thrown across the sewer, where the rails crossed it, to enable the horses attached to the cars to pass over. During the day a pole was placed across the track to prevent carts passing over the bridge, which was taken down when the cars were to pass, and appears to have been removed altogether at night. On the west side of the track carts could pass, according to some of the witnesses, to some little distance north of the sewer, when the projection of a pile of lumber narrowed the passage to nine or ten feet, and just beyond this, a building used as a corporation office, formed another projection, so as to leave between it and the track only four feet four inches. It was shown that ordinary carts are seven and a half feet wide, while dirt carts are two feet narrower, so that neither description of cart could pass at this point except by running in part on the track itself. This corporation office was nearly opposite the north sidewalk of Gansevoort street, and at the same point there was a pile of stones and dirt from a foot to a foot and a-half in height. One witness says, that the west side of the track, by which I understand him to mean the side west of the track, "was impassable on account of the excavation, the dirt, the paving stones, and the corporation office."

As has been stated, the night was very dark; the sound of the rolling of the car was obstructed by the water on the rails, though the clattering of the horses' feet was heard half a block off, and might have been heard farther, as one witness states, by one in the street.

The deceased appears to have stopped and tied his horse near the embankment, on the east side of West street, at about twenty feet below the south line of Gansevoort street, and to have dismounted and gone on to the track, for when the cars had passed, he was found lying across it, about six feet south of the embankment.

It is reasonable to conjecture that his object in going upon the track, was to make a personal examination of the bridge over the causeway, with a view of ascertaining whether he could safely pass over it, with his cart. The car had crushed one of his legs. He was removed to the hospital, and died soon afterwards. He was between thirty and forty years of age, of good habits, and making from \$25 to \$30 a week by his business. He left a widow,

(the plaintiff,) and three infant children, the youngest but three months old.

On the trial, a motion was made for a non-suit on the ground, among others, that the plaintiff had offered no poof showing affirmatively that the deceased was not guilty of negligence which contributed to the accident, which motion was overruled, and the defendants excepted.

This court has never recognized the rule which seems to be laid down by the Supreme Court in *Spencer v. The Utica and Schenectady Railroad Co.*, (5 Barb. Rep. 337,) to wit: That absence of negligence on the part of the plaintiff is to be shown by him affirmatively, but have held directly otherwise. The case of *Britton, admx. v. The Hudson River Railroad Co.*, recently decided by the General Term of this court, is directly in point. It had been previously so decided in this very case. (5 Duer, 21.)

The Judge, in charging the jury, told them, "that considering the nature of the business in which the defendants were engaged, and the hazards attending the running of cars in the streets of the city, and particularly on a dark night, the defendants were bound to exercise the utmost care and diligence, and for the purpose of avoiding accidents, endangering property and life, were bound to use all the means and measures of precaution that the highest prudence would suggest, and which it was in their power to employ. Hence," he added, "if the use of bells and of lights was a measure that the prudence and foresight the defendants were bound to exercise ought to have suggested, and if by such use disastrous accidents would probably be avoided, the omission to use them, if proved to the satisfaction of the jury, was culpable negligence, and that it was for the jury to say, whether to this culpable negligence the fatal accident that had given rise to the action might not justly be imputed."

To both the general proposition itself, and the application of it by the Judge, the defendants excepted.

The Supreme Court in *Brand v. The Schenectady and Troy Railroad Co.*, (8 Barb. R. 368,) held, "that ordinary prudence was all that could be exacted from a railroad company, as between it and a foot passenger in the street, being the same rule or degree of care which is exacted, as between each other, in the case of two carriages using a common highway to which each has an equal right."

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With the highest respect for the learning and ability of the eminent Judge who pronounced the decision in that case, I cannot but think that this proposition is open to serious criticism. It seems to me that the only safe rule in such a case, is this, to wit: That the company is bound to use a degree of care and vigilance in respect to the use of the means whereby accidents or injury to those using the same thoroughfare in common with themselves, may be avoided, which is proportioned to the dangerous character of its business, or of the mode and means of conducting the same, while the foot passenger is bound to that degree of caution which persons thus exposed on a public thoroughfare ought in common prudence to exercise. This prudence may in both be called ordinary, yet the degree of diligence and precaution which it exacts of each is as widely different, as is the risk to which each exposes others from the want or absence of it.

In the case of *Kelsey v. Barney and others*, (2. Kern. R. 425,) which was a case of collision between two vessels, Johnson, Justice, in defining ordinary care, uses this language: "The degree of vigilance which the law will exact, as implied by the requirement of ordinary care, must vary with the probable consequences of negligence, and also with the command of means to avoid injuring others, possessed by the person on whom the obligation is imposed. Under some circumstances a very high degree of vigilance is demanded by the requirement of ordinary care; where the consequence of negligence will probably be serious injury to others, and where the means of avoiding the infliction of injury upon others are completely within the party's power, ordinary care requires almost the utmost degree of human vigilance and foresight."

The learned Justice refers in his opinion to the case of the *Scioto*, in which Judge Ware uses the expression that "a vessel entering a harbor in the night time, is put on her utmost vigilance." Not that the vessel so entering the harbor would be responsible, if by any possible means the danger of a collision might have been avoided, but that from the increased hazard arising from the circumstance of entering the harbor in the night time, an increased vigilance and watchfulness would be required, which Judge Ware exemplifies by saying, that under such circumstances the master and crew ought to be on deck, and in such

parts of the vessel as to be able to control her motions, and see any vessel which lies in her track. It certainly would not be contended that it would be necessary that both the master and the crew should all be on the look-out and on deck if the vessel were entering the port in broad day-light. The principle asserted is, that the vigilance and care are to be proportioned to the risk and danger to be avoided.

The good sense and soundness of this view of the question cannot, I think, be doubted. If the vigilance and care are to be proportioned to the danger to be avoided, it becomes immaterial by what name the obligation is designated or defined. If the Judge in the case at bar had instructed the jury, that in the exercise of ordinary care, the defendants were bound to the exact degree of vigilance which he stated as the measure of their actual obligation, I do not see how the charge could have been complained of; and certainly if the standard of care which he laid down was correct, the question—whether a proper definition was given to it or not?—is wholly immaterial.

The Judge, in applying the rule to the case in hand, defines his meaning so clearly, that it cannot, I think, be misapprehended.

He told the jury that, if the use of bells and lights would probably prevent the occurrence of such disasters, and if their use was a measure that the prudence and foresight the defendants were bound to exercise ought to have suggested, it was culpable negligence in them not to have used them. Now I think it must occur to the commonest apprehension, that the very least or lowest degree of vigilance which could be required at the hands of the defendants in running loaded cars at night, with four horses, through the streets of a crowded city, would be the use of bells and lights, or some similar precaution, to give warning of their approach. In submitting to the jury, therefore, the question of their use as a measure called for by the prudence which the law exacted from the defendants, the Judge left them clearly within the range of the rule of ordinary care, as commonly understood, if he did not, indeed, limit them to it altogether. Nor was this left to them as a question to be arbitrarily determined; its propriety was to be tried by this criterion, to wit: Whether the use of bells and lights would probably prevent the occurrence of disasters of this nature? Of this the jury were exclusively the

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judges, and if, in their opinion, such would be the beneficial result of the use of bells and lights, then, as upon any rule of prudence, the defendants were bound to guard against the danger of such accidents, their use was a measure called for by the degree of care which the law imposed upon the defendants.

Nor do I think that in judging of the propriety of the use of bells and lights, the jury were led by any thing in the charge to adopt a standard of obligation on the part of the defendants, which was not the true one, or that the result would have been at all different had the Judge prefaced his definition of the prudence to which the defendants were bound, by calling it "ordinary care." Nor do I think that in any definition of ordinary care, as applied to these defendants under the circumstances detailed in this case, he could have required a less degree of vigilance and prudence than that which he laid down as the measure of their actual obligation.

The good sense of the charge seems to me to be plainly this: The defendants, considering the great hazard to which their business exposes the lives and safety of the passers by and travellers in the street, are bound to use that diligence and care, if practicable, by which the danger of casualty may be diminished. They cannot run their cars without any precautions whatever, and no precautions will suffice, save such as tend to secure against the occurrence of the disasters to which the exercise of their business peculiarly exposes others; and if, in the judgment of the jury, the use of bells and lights would have this tendency, then the use of that expedient was one which the prudence, exacted of them by the law, required at their hands. The test of the obligation to use them, as the case was thus put to the jury, was not the formal definition of the rule of diligence, but the tendency of the expedient to diminish the danger of those disasters, which the defendants were bound, upon the commonest principles of humanity, and under the lowest obligations of a reasonable diligence, to guard against.

The defendants' counsel denies altogether that the use of bells or lights is called for by the rule of ordinary care; on the contrary, he says, the degree of care which should be exercised in any given case, is a matter of law to be determined by the court; and that in leaving to the jury to determine whether the defendants should have carried lights or bells, the court shifted from

itself to the jury the duty of determining whether the defendants ought not to have exercised more than ordinary care.

We think there is a fallacy in this proposition. The Judge did not leave to the jury to say, whether the defendants were bound to carry bells and lights, but whether the use of them was called for by that prudence which they were bound to exercise. In other words, whether, in view of the peculiarly hazardous character of their business, and under all the circumstances of the case, it would have been a prudent measure on the part of the defendants, rendering danger of accident less liable; and if so, then, as a matter of law, he instructed them the defendants were bound to have used them; and not to have done so, was negligence.

He therefore did determine the question of law, to wit: That the prudence exacted of the defendants was that which, in view of the hazardous character of their business, would tend to diminish the danger of accident, leaving to the jury only this question—whether the use of bells and lights was a measure of that character? which was a question purely of fact.

I think the rule laid down by the Judge at the trial is the true one, to wit: A degree of care proportioned to the danger to others—whether this be called “ordinary” care, or “the utmost,” or “highest” care, or “diligence,” is immaterial, a mere question of words; so long as the standard is right, its name is a matter of no consequence. A great principle may easily be lost sight of in this adherence to definitions. It seems to me that no other rule can be safely adopted. It is one which is not dependent on contract or the consideration of a compensation for service, but is founded on the general principle of humanity towards others, and the obligation so to use one’s own property and exercise one’s own rights as not to injure others.

The Judge also charged, that as respects the deceased, he was bound to exercise only ordinary care; and to this there was an exception. This is certainly not a proposition that the defendants should quarrel with, as it is the one they contend should be applied to themselves.

The difficulty of applying the rule of diligence to either party in cases of this kind, arises from the very terms in which the law has, from custom, clothed the definition of it. “Ordinary” care, in its common acceptation, means the same thing, to whomsoever applied, and under whatever circumstances. The only solution

to the difficulty, is, in measuring the requirements of "ordinary care" by the circumstances of the party; and to use the language of the learned Judge, in *Kelsey v. Barney*, already cited: "By the probable consequences of negligence, and by the command of means to avoid injuring others, possessed by the person on whom the obligation is imposed." As respects these defendants, the probable consequences of their negligence would be death, or maiming to the party injured; and as to the command of means to avoid such a disaster, if the use of bells or lights would tend to such a result, it is for them to show that it is not in their power to adopt such an expedient, or they should be estopped from denying that the obligation of prudence exacts it at their hands.

When, however, we speak of ordinary prudence, as applied to a passenger in the street, we mean something widely different. His being on the track, may, under certain circumstances, be negligence, which would relieve the company from liability for the consequences of an injury to him, but it is not a negligence which exposes them to hazard; the prudence which he is to exert is one which is necessary for his own protection, and must be of precisely that degree which is commensurate with the danger to which he is exposed. To attempt to pass in front of a carriage driven slowly, at a moderate distance, might not violate any rule of prudence, while to make the same attempt in front of a car, approaching at the same speed, and at the same distance, might be extremely hazardous. There is no applying "ordinary care" by a fixed measure, to all possible cases. It must vary in the degrees of its requirement according to circumstances. "Reasonable care" would have been a much happier and more intelligible expression. We think the Judge sufficiently and promptly defined it when he said that it was "that care and foresight which men of ordinary prudence are accustomed to employ, and which, placed in like circumstances with the deceased, they probably would have employed."

The defendants also contend that it was error in the Judge to have charged that the negligence of the plaintiff, which would excuse the defendants, must have contributed directly to the accident.

This ruling is in exact accordance with the language of the court, in *Caldwell v. Murphy*, (1 Duer R., 233,) and with the decision in *Carroll v. N. Y. and N. H. Railroad Co.*, (1 Duer, 571.)

The Judge further told the jury, that it was probable that from the want of lights the driver of the car could not see in front of his horses, or if there was sufficient light, that his attention was directed another way; and that upon either supposition, there was negligence to which the accident might reasonably be imputed, and to this part of the charge also the defendants excepted.

As the Judge had already left it to the jury to say whether the use of lights in the cars was a measure that the prudence and foresight which the defendants were bound to exercise ought to have suggested, this part of the charge must be read in that connection; and thus read, the meaning of it is, that if the jury should find the question thus submitted to them in the affirmative, then the absence of lights, enabling the driver to see in advance of his horses, was negligence; or if in fact there were lights, but his attention was not given to his horses, but diverted elsewhere, that would be negligence. It was reiterating in another form the proposition already advanced by him.

We think the Judge properly refused to charge that the manner in which the deceased was found on the track, without any explanation as to how he got there, was *prima facie* evidence of negligence on his part.

He was not discovered until after the car had passed over him, and to hold that, because he was then found lying athwart the track, his position was presumptive evidence of negligence on his part, which, unexplained, would excuse the negligence of the defendants, would be giving the latter the benefit of their own wrong, and would forever preclude the possibility of a recovery in this action.

The Judge further told the jury, in this connection, that the deceased "certainly had not seen or heard the approach of the car in time to make his escape, and if the fact of his being found on the track was alone sufficient to bar a recovery, no action like the present, however gross and culpable the negligence of a railroad company, could ever be maintained."

The defendants contend that it was error in the Judge to tell the jury that the deceased "certainly had not seen or heard the approach of the car in time to make his escape."

As it was not pretended that the deceased was a voluntary victim, it seems to follow that he could not have seen or heard the approach of the cars. Was it negligence in him not to have done

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so? The defendants contend that it was. That question was not withdrawn from the jury, for they were told that if they believed from the evidence that he was guilty of any negligence directly contributing to the disaster, the plaintiff could not recover. The effect of the language in question is this: The deceased was, certainly, not on the road for the purpose of self-destruction; no presumption of this kind can be entertained, and if so, then the mere fact that he was found dead on the track does not, of itself, raise a presumption of negligence on his part which will bar a recovery.

The Judge also charged, that the omission of the defendants to call either the conductor, driver, or brakeman, as witnesses on their behalf, unexplained, raised a reasonable presumption, that if called, they would not have contradicted materially the witnesses of the plaintiff, and to this there was an exception.

This is in clear accordance with an elementary rule, that a party who has the power to produce the best evidence on the subject, and omits to do it without excusing the omission, justifies by such omission the presumption that the evidence, if adduced, would operate to his prejudice, or, at least, would not help his case. (1 Starkie's Ev. 34; C. & H.'s Notes, n. 298.)

On the question of damages, the Judge, among other things, said to the jury, that the "deceased was a young man in good health, and the probable continuance of his life was at least twenty years." The defendants contend that it was error thus to have instructed the jury in respect to the probable continuance of the life of the deceased. The evidence was, that he was over thirty years old—how much does not appear; but the reasonable inference from the expression, "over thirty years of age," is that he was under forty.

I have been referred to certain tables prepared from the combined experience of seventeen life insurance offices, from which it appears that the expectation of human life at thirty years of age is 34–43 years, and at forty years is 27–28 years, so that the Judge was within limits when he said that it was at least twenty years. This is a matter of experience, about which it was not error in the Judge to instruct the jury.

On the whole case, the judgment should be affirmed, *with costs*.

Justice Woodruff dissented from the foregoing opinion and its conclusions.

CASES OF PRACTICE,
AND
DECISIONS IN SPECIAL PROCEEDINGS,
AT THE
GENERAL AND SPECIAL TERMS,
AND AT CHAMBERS.

COBB v. LACKEY & BRANDON.

When the defendant, in an action to recover personal property, excepts to the sureties in the plaintiff's undertaking, if one fails to justify, and for that reason a new surety is substituted, a new undertaking must be executed. The original undertaking cannot be altered by inserting therein the name of the new surety, and by the latter signing it, without the consent of the other surety, and of those for whose benefit or protection it is required to be given.

When the original undertaking was altered, after notice of exception to the sureties therein, on one of them failing to justify, by inserting the name of a new surety, who signed it, and made an affidavit of justification before one of defendants' attorneys, and in the presence of the attorneys of both parties, at the time and place for which notice of such justification was given, and the attorneys then separated without obtaining an approval of the sureties by a Judge of the court, and plaintiff's attorney, subsequently, obtained *ex parte*, an approval of the undertaking, as thus altered, that approval, on motion, was set aside, as being irregular, but the plaintiff was permitted to give a new undertaking, with sureties who should justify on due notice. The fact that the substituted surety made an affidavit of justification, under the circumstances stated, before one of defendants' attorneys, was held not to be a waiver of the defendants' right to object to the insufficiency of the undertaking, or to the irregularity of the *ex parte* allowance, the sufficiency of the undertaking not having been assented to by defendants' attorneys in writing, nor proved to have been distinctly assented to orally.

(At SPECIAL TERM, May, 1857. Before WOODRUFF, J.)

THE facts are fully stated in the opinion of the court.

WOODRUFF, J.—The defendants herein move to set aside the certificate of justification, obtained by the plaintiff on an application to one of the Justices, *ex parte*, under the circumstances, which may be briefly stated thus. The action is to recover the possession of personal property. An undertaking having been given to the sheriff, he has taken the property. The defendants excepted to the sureties, and gave notice thereof. The plaintiff gave notice of justification, and the parties appeared at the court room. One of the sureties was examined, and the other refused to answer fully, and an adjournment was had to enable the plaintiff to procure another surety, who should justify. On the further appearance, instead of preparing a new undertaking, the plaintiff's attorney inserted, in the undertaking previously given, the name of the new surety, and it was signed and acknowledged by him, and he was examined by the defendants' counsel. Although these proceedings were had in the court room, the papers were, none of them, laid before any Judge of the court. Whether any Judge was in the court room at the time or not, the oath was not administered to the sureties by the Judge, but the statement of the sureties, being reduced to writing, was sworn to by the sureties respectively, before the counsel for the defendants, who is also attorney for one of the defendants, and a commissioner of deeds; and the new bail acknowledged the execution of the undertaking before him. At the time of the alteration of the undertaking by introducing another surety, it does not appear that either of the other parties thereto, (one of whom had been examined, and the other had declined answering in full,) was present or consented to such alteration, though their names were contained therein, and the instrument was thus converted into an undertaking by three instead of by two, as it was originally executed by them.

After the alteration had been made, and the acknowledgment and examination were completed, the parties separated; upon what terms and upon what understanding is now a matter of dispute. On the part of the plaintiff evidence is given that the counsel for the defendants declared himself satisfied with the undertaking and with the sufficiency of the sureties, and that the plaintiff's attorney (under the belief that it was not necessary to

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procure a certificate from a Judge, or to appear formally before a Judge at all, when the defendants' attorney, as commissioner, had certified to the oath, and as he believed and states had declared himself satisfied,) left without doing any thing further.

On the part of the defendants, it is denied that their attorney or counsel was satisfied with the undertaking or the sufficiency of the sureties, or that he did consent to any approval of the undertaking. It is insisted that he consented to administer the oath to the sureties, and to take the acknowledgment, but that he did not in fact intend to waive, nor could he properly be understood thereby to waive, any objection to the sureties or to the undertaking itself.

Nothing further was done for several months, when the sheriff, not having been furnished with any evidence of the approval of the undertaking, requested the defendants' attorneys to indorse their approval thereon, and each of them declined. After a further delay of more than four months, the plaintiff's attorney applied to one of the Justices, *ex parte*, and on an affidavit stating the circumstances as claimed by him, obtained an allowance of the undertaking as sufficient, and a certificate thereof.

The object of the present motion is to set aside that allowance.

It was irregular to apply to a Judge, *ex parte*, and procure an approval of the undertaking. If an application for such approval was necessary, and no doubt it was, it was a submission of the question, whether the undertaking was a proper one, and the sureties were sufficient, to the Judge for his decision; upon that subject a "finding" of the Judge was necessary, (Code, §196,) and this must be had upon notice, (§ 195 and § 210.)

It is not improbable that, if the plaintiff's counsel had insisted upon going before a Judge at the time the bail were examined, the approval might then have been had, but in the conflict of the affidavits on the subject, I cannot say that any case is made by the plaintiff which should prevent the defendants from insisting upon the irregularity. If there did not now appear any substantial objection to the sureties, or if a clear case of consent to the allowance was established, a new allowance might, perhaps, be ordered, or the *ex parte* allowance be affirmed, notwithstanding the irregularity; and yet so far as the plaintiff seeks to support the proceedings by proof of the assent of the defendants' counsel, the

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conflict of affidavits here well affirms the wisdom of the rule, that consents or assents, given by attorneys or counsel out of court, should be in writing, to prevent uncertainty and misapprehension. But the serious objection to the present undertaking is, that after it had been executed and delivered to the sheriff, and had so far served its purpose, that, in reliance thereon, he had taken the property, it was altered, by the introduction of another and additional name therein, without the consent of the other parties thereto, or so far as appears, of the sheriff. Although it may be said, that such an alteration after the execution of the instrument tends to the relief and not to the prejudice of the other two sureties who were theretofore bound thereby, it is not clear that for that reason the alteration was as to them immaterial and did not affect their liability. I am not satisfied that a bond or other instrument given by two, can, without their consent, be converted into a bond or instrument by three or more without impairing its validity. I doubt very much, whether, when the alteration of an instrument after execution is in a material particular, it is proper to inquire whether the parties bound thereby can be prejudiced. It is no longer the same instrument. They have never consented to become so bound. But it is not necessary that I should dispose of this matter upon that ground. The Code is explicit; section 193 applied to this proceeding by section 210, provides that notice of justification being given as therein mentioned, "in case other bail be given, there shall be a new undertaking in the form prescribed in section 189." Under this provision, I am clearly of opinion, that the undertaking ought not to have been approved, even if the matter had been regularly presented to the Judge.

If the consent of the defendants' counsel would operate to prevent his now setting up the objection, that consent is not in writing, and is not clearly proved to have been orally given. The allowance was irregularly obtained. It is at least doubtful whether the undertaking, after having been altered, has any validity; and I am therefore of opinion that the defendant ought not to be required to rely upon it as his security.

It is proper to add, that this motion is made on notice to the sheriff, and no facts are submitted on his part, raising the question, whether his protection requires that this *ex parte* allowance should be sustained to any extent, or whether it can be so sus-

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tained? It does not appear that he has acted in reliance thereon, nor that he has not the property seized still in his custody.

The allowance of the undertaking must be set aside; the defendants' costs of this motion, \$10, may abide the event of the suit; and the plaintiff may have leave to give a new undertaking within ten days, with proper sureties, who shall justify, on the usual notice, and such leave may be, (if deemed necessary,) made a condition of setting aside the present allowance.

H. P. Allen, for plaintiff.

Chas. W. Sandford, for defendants.

JACOB H. FAKE v. EDGERTON AND BRITTAN.

Absence of material witnesses is sufficient cause for postponing a trial, when it is shown that they are material, and that due diligence was used to procure their attendance.

When that is not shown, a trial should not be postponed on an allegation that such grounds for it exist, nor will an inquest, taken upon a denial of a postponement asked on such grounds, be set aside, merely because the affidavit to procure it was drawn, and the motion for it was made by an attorney's clerk, who did not know enough to present properly to the court the facts then known to exist, and which formed the grounds of the relief sought.

Nor will a regular inquest be set aside if a defendant delays to move until he has been arrested upon an execution against his person, issued after the return of a previous execution against his property, when it appears that paying the judgment, will be the payment of a just debt, and a protection to the defendant against all claims upon the demand on which it is recovered that may be made by the third person, whom the answer, as a defence, alleged to be the person with whom alone it was contracted.

(At SPECIAL TERM, Sept., 1856. Before WOODRUFF, J.)

THE defendant, Edgerton, who alone answered, moved in October, 1856, to set aside an inquest taken on the 27th of the previous June. The taking of it was not only known at the time, but the defendant then moved for a postponement of the trial, which motion was denied. The present motion was not made until after an execution against property had been issued and returned unsatisfied, nor until after some six weeks subsequent to

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his arrest upon an execution against the person. The action was brought for goods sold and delivered by the plaintiff to the defendants, and the defence was, that they were sold by John S. Fake, and not by the plaintiff. There was no pretence of a defence, if the plaintiff was the owner and vendor of the goods, nor that payment for them had been made to John S. Fake. The other facts, and the grounds on which the motion was made, sufficiently appear in the opinion of the court.

WOODRUFF, J.—The defendant, Edgerton, moves to set aside an inquest in the above action, taken on the 27th day of June last. The case was on the calendar of the previous day, but was postponed upon the application of the defendant, in consequence of the engagement of his counsel in the United States District Court. An effort was made on the 27th, by the defendant, Edgerton, (who alone had put in an answer,) to procure a further postponement, but the grounds of the application were not deemed sufficient, and the cause was therefore called, and the defendant not appearing, the plaintiff proceeded to an inquest, and a judgment was entered thereon.

The grounds upon which the present motion is urged, on behalf of the said Edgerton, are:

1st. That he has a meritorious defence.

2d. That his witnesses were absent from the city, when the cause was called for trial.

3d. That his counsel was actually engaged in the District Court at the time the inquest was taken, and that the clerk, in his office, by whom the application to postpone was made on the 27th of June, and by whom the affidavit for that purpose was prepared, had not sufficient experience and skill to prepare the affidavit properly, and that the postponement was denied by reason of its insufficiency.

In relation to this last suggestion, it may not be amiss to observe, that the practice of employing students, and in some instances, of mere errand boys, to attend court, prepare affidavits, and make motions, would not formerly have been permitted at all; and if by reason of the immediate engagement of counsel, his clerk be allowed to suggest such engagement, it is by no means an act of prudence to entrust to him the conduct of an important motion,

and the preparation of the papers therefor. It is not too much to say, that if the opposing counsel and the court, depart from the established rule governing the conduct of proceedings in open court, so far as to give indulgence to such an application, the inexperience or want of skill of the clerk ought not afterwards to be urged as a ground for any relief upon facts then existing, and which ought then to have been laid before the court.

The engagement of counsel in the trial of a cause in another court is generally regarded as a ground of indulgence, and it seems was so treated when this cause was first called for trial, and for that reason it was postponed to another day; but when it became apparent that further delay would not only involve the loss of a term, but would have delayed the cause over the summer vacation, for three months, it does not seem to me that such excuse should have prevailed.

The absence of the defendant's witnesses was undoubtedly sufficient cause for postponement, if it was made to appear that their testimony was material, and that due diligence had been used in the endeavour to procure their testimony. That, however, was not shown, and it is conceded on the present motion, that the postponement of the cause was properly denied upon that ground.

The remaining material inquiry is, then, Ought the inquest to be set aside, notwithstanding the previous laches of the defendant, on the ground that he has a meritorious defence, and that, therefore, injustice will result from the application of a strict rule?

The action is brought against two defendants, Edgerton & Brittan, as partners, under the firm name of T. T. Edgerton & Co., for goods alleged to have been sold to them by the plaintiff. And it appears that an order for the arrest of the defendant was obtained on the ground that the debt was fraudulently contracted.

The question whether such order was or was not properly made, does not come under review on this motion. Although the defendant denied the fraud, that was no part of the issue to be tried. The only defence to the action was, that the plaintiff did not sell and deliver the goods to the defendants. And it now appears by the affidavits, that this defence proceeds upon the allegation that the goods were sold to the defendants by John S. Fake, and not by the plaintiff.

The defendants therefore, had the goods, and are liable to pay

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for them; and the merits of the controversy present the single question, who was the owner of the goods sold, or rather does it appear from the facts laid before me, that any injustice will result from permitting the present plaintiff to enforce the judgment?

In this connection, it is important to notice, that this inquest was taken in June last, and no steps were taken to obtain relief therefrom, until the middle of October. In the mean time, execution had been issued against the property of the defendants, and returned unsatisfied; and an execution against the body of the defendant being thereupon issued, the defendant was arrested thereon, on or about the 2d day of September, and having given bail for the jail limits, the defendant afterwards, as it is alleged, departed therefrom, whereupon the plaintiff commenced a suit against the sheriff for an escape, which is now pending. Under such circumstances, it would not be a harsh exercise of discretion to deny the present motion, upon the ground of delay in making the application. On the contrary, it is rather in conformity with the long approved practice of the courts, to deny it on that ground alone. If, however, to this be added, that it does not appear that injustice will be done by suffering the judgment to stand, there will be no room for hesitation. And upon that subject, the delay itself, not only after notice of the judgment, but for six weeks after the defendant was taken in execution, indicates, pretty clearly, that the defendant did not feel himself in any danger of suffering any injustice.

But upon the papers laid before me, it is not doubtful. There is no pretence that the goods were not sold, nor that the money was not due therefor. And it is conceded, that John S. Fake sold the goods to the defendants. And although the defendant, and the persons whose affidavits are produced by him, state that he sold them in his own name, and as the owner thereof, (not disclosing any principal,) yet the defendant does not intimate, that had the suit been brought in the name of John S., he has any defence which could defeat a recovery. While on the other hand, the plaintiff produces not only the affidavit of John S., stating that in making the sale, he was only agent for the plaintiff, who was the real owner of the goods, and that the defendant knew that he was so acting. But he also produces the affidavit of the co-defendant, Brittan, that the ownership of the plaintiff was stated to

Mallory v. Wood.

him in the presence of the defendant, Edgerton, before the delivery of the goods was completed, and long before this suit was brought.

I am not disposed to try the merits of the cause upon conflicting affidavits on such a motion as the present; but I advert to this state of the proofs before me, and to the additional fact also stated, that the proofs taken on the inquest were to the same purport and given by the same John S. Fake, and the co-defendant, Brittan, for the purpose of saying, not so much that all pretence of any defence is refuted, as that the defendant is abundantly protected against any injustice to be apprehended from any claim by John S. Fake to recover for the same goods, and that, in connection with the long delay of the defendant in making his motion, the indication is very strong that there is no good faith on his part in the motion itself.

The motion must be denied.

MALLORY v. WOOD & BROWN.

When an action is tried by the court, without a jury, it cannot be referred to the General Term for its decision, primarily, of any question of fact or of law. The only mode of obtaining a review of any decision on such a trial, whether made during its progress or at its close, is by an appeal under § 848 of the Code.

(At GENERAL TERM, October, 1856.)

THESE points were decided, and the opinion of the court at General Term, as delivered by Hoffman, J., is reported in 14 How. Pr. R. 67.*

* In many of the practice cases reported in this volume only the points decided are published. This course is generally pursued in respect to cases already reported in Howard's or Abbott's Practice Reports. It is believed that, in respect to such cases, the profession will prefer a correct statement of the matters decided, with a reference to the volume in which they have been reported, to a re-publication of the cases at length in the reports of this court, as the profession generally take the Practice Reports, and a duplicate of such cases can be of no great service. This course will enable the reader of the Reports of the Superior Court to ascertain from them its decisions on questions of practice, and to find the reasons for such decisions when he may desire to examine them, and will leave more space for cases of more permanent interest.—J. S. B.

WILLIAMS v. HORGAN & HORGAN.

Where one of several defendants, who has by separate answer made a separate defence, and is not united in interest with the others, succeeds on the trial, he is not in any action, legal or equitable, entitled to costs, as of course, but must apply for them to the court. (Code, § 306.)

But if there is a union of interest, and the defendants have, by their answer, denied the allegations of the complaint, whether they answer jointly or separately, and if the case be one of those mentioned in section 304, then, if either defendant obtains a verdict, he will, as a general rule, be entitled to costs, as a matter of course, under section 305.

But, although the defendants be sued as joint contractors, yet, if they answer separately, and either sets up a defence personal to himself only, as infancy, or the like, and succeeds at the trial, it is within the discretion of the court to award him costs, or to deny them to him.

(At SPECIAL TERM, November, 1856. Before SLOSSON, J.)

SLOSSON, J., decided as above stated, and the case is reported in 13 How. Pr. R. 139.*

BUCHANAN v. MORRELL, and others

The Code, as it read in 1856, does not authorize an extra allowance of costs in an action by a judgment creditor, to set aside transfers of property made by his debtor, and to procure the appointment of a receiver of such property, and of its proceeds and profits, and to compel the assignee to account for and deliver such property, proceeds and profits to the receiver, to be applied by the latter to pay the judgment. It is not one of the actions specially named in § 308.

It is not an action for the recovery of money, within the meaning of those words, as used in § 308, and sub. 4 of § 304, of the Code.

Those words are used in the same sense in both of these sections, and do not include actions in which relief, other than a judgment for money, must be granted to

* The learned Judge intimated in his opinion in this case, that when a plaintiff sues several as joint contractors, and proves that only a part of the defendants were ever liable, he cannot recover against either. It is, probably, now well settled, that he may recover against such as are proved to have been parties to the contract, and that the others may have a verdict and judgment in their favor. (*Clapin v. Butterly & Devin*, 5 Duer, 327.)—RXP.

Merchants' Bank of New Haven v. Dwight.

enable a plaintiff to maintain the action, although the ultimate result in view and purpose is to realize money. These words, as here used, mean an action in which the plaintiff merely seeks to recover a judgment for a sum named.

(At SPECIAL TERM, Dec., 1856. Before BOSWORTH, J.)

BOSWORTH, J., so decided in this case, which is fully reported in 13 How. Pr. R. 296

McCULLOUGH v. BRODIE, et al.

An action cannot be referred, except by consent of parties, merely because the trial of it will require proof of various small items of damage. To justify a compulsory reference, the trial must involve "the examination of a long account on either side," according to the ordinary acceptance of the word account.

The only fact which authorizes a compulsory reference is the same, under the Code, as when the Revised Statutes alone gave the power to refer. (2 R. S. 384, § 40; Code, § 271, sub. 1; 19 Wend. 31; 25 id. 687; 6 id. 503; *Van Rensselaer and others v. Jewett*, 6 Hill, 873.) This case is reported in 13 How. Pr. R. 346.

(At SPECIAL TERM, Dec., 1856. Before BOSWORTH, J.)

THE MERCHANTS' BANK OF NEW HAVEN v. HENRY DWIGHT, JR.

Although a debt was fraudulently contracted, or an obligation was fraudulently incurred by a defendant, yet if, subsequently thereto, the plaintiff, with full knowledge of the fraud, settles the original debt or obligation, and enters into a new contract with the defendant, upon different terms, and upon additional consideration, in an action upon the new contract, the defendant cannot be held to bail merely because the original debt or obligation was fraudulently contracted or incurred. In such a case, if the debt for the recovery of which, or the obligation on which the action is brought, was not fraudulently contracted or incurred, the defendant cannot be held to bail. The order, refusing to vacate an order of arrest, on which defendant was held to bail in the sum of \$45,000, reversed. (13 How. Pr. R. 366.)

(At GENERAL TERM, Dec., 1856. Before OAKLEY, CH. J., DUEK, BOSWORTH, SLOSSON, HOFFMAN and WOODRUFF, J.J.)

E. W. Stoughton, for defendant and appellant.

James T. Brady and Libbeus Chapman, for plaintiffs.

Cushman v. Martine.

In the opinion delivered, after stating the facts at length, BOSWORTH, J., who delivered the opinion of the court says:—These facts present this question: Is a defendant, who was guilty of a fraud in incurring an obligation, which has been surrendered by another party to the contract, after he had discovered the fraud, and who thereupon took a new obligation, in incurring which the defendant was guilty of no fraud, liable to be arrested on the latter obligation, by reason of his fraud in incurring the first?

When a defendant is sued in an action arising on contract, to recover a debt, or a sum which he has obligated himself to pay, the Code does not authorize an arrest, because the defendant was guilty of a fraud in incurring a prior and different obligation to pay the same money. To authorize an order for his arrest, he must have been guilty of a fraud in incurring the obligation for which the action is brought, in which the order of arrest is made or applied for. Code, § 197, sub. 4.

. The contract, or obligation, on which this action is brought, was made or incurred without any fraud being practised to procure it. It was accepted as a settlement of the transaction, in respect to which the alleged fraud was practised, and with full knowledge of it. I think this ground sufficient to require a reversal of the order appealed from.

CUSHMAN v. MARTINE, et al.

To render an appeal, from a judgment of a court at General Term, to the Court of Appeals, a stay of all proceedings upon the judgment appealed from, a copy of a proper undertaking must be served with the notice of appeal.

Filing and service of a copy of an undertaking on a day subsequent to that on which the notice of appeal was served, will not operate as a stay.

The court which rendered the judgment appealed from will not, on such a state of facts, order proceedings stayed pending the appeal.

It will not so order unless the proceedings upon appeal are amended and validated upon a motion made for the purpose, and with the assent of the sureties in the undertaking. (Reported in 18 How. Pr. R. 402.)

(At SPECIAL TERM, December, 1856. Before BOSWORTH, J.)

Hoyt v. Sheldon.

LATHAM v. BLISS & CHILDS.

When persons, severally liable, are united as defendants, but appear by different attorneys, and answer separately, and after issue joined, and after the action has been noticed for trial, settle, and, as part of the terms of settlement, agree to pay to the plaintiff the legal costs of the action, the plaintiff is entitled to only one bill of costs. He cannot have a full bill against each defendant. He is entitled to all the disbursements actually made, and which would have been taxable if the defendants had been sued separately.

He is not entitled to a term fee for a term commencing subsequent to the settlement, although the action had been noticed for such term, and a note of issue filed, and a calendar had been made for such term, containing such action. (Reported in 13 How. Pr. R. 416.)

(At GENERAL TERM, December, 1856. Before OAKLEY, CH. J., BOSWORTH, HOFFMAN, and SLOSSON, J.J.)

HOYT v. SHELDON, executor of THOMPSON, et al.

Section 177 of the Code has provided a uniform mode of bringing before the court matters of defence which existed when the answer was put in, but of which the defendant was then ignorant, as well as matters of defence which have arisen after issue joined. That is to be done by supplemental answer.

As section 469 of the Code continues in force, all the pre-existing rules and practice of the courts, not inconsistent with the Code itself, the settled rules and practice of the courts of law and of Chancery, must be consulted, in determining whether the application is, in substance, one of strict right, or is addressed solely to the discretion of the court.

Such applications should be granted, as a general rule, unless they have been too long delayed, or are clearly frivolous, or the defence presented is so inequitable in its nature that the permission sought should be refused for that cause.

On the facts of this case, *held*, that the motion could not, properly, have been denied on the mere ground of *laches*.

The court will not, as a general rule, after the time to answer has expired, allow a supplemental answer to be put in, to set up a technical defence, which may operate as a forfeiture of a just claim. But when the cause of action is one of equitable cognizance, although it may be one of strict legal right, and can be enforced only by depriving a defendant of property bought in good faith from an assignee of a common debtor of the plaintiff and the defendant, and which property, on principles of general equity, might, as properly, have been applied to satisfy the claim of the defendant as that of the plaintiff, the court will not

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attempt, on such a motion, to determine the equities of the parties, and refuse leave to set up the defence.

The court will not do so, when, upon the settled principles of equity proceedings, the particular defence may be overruled, if giving effect to it according to its legal operation, would defeat a cause of action contrary to the intent of the parties to the transaction which constitutes the supposed defence.

When it cannot be well decided, except upon a hearing of the whole case, whether as between the parties to the action, it would be inequitable to give effect to the defence, if proved; and the court is competent to dispose of that question at the hearing, as may be just, a supplemental answer will be allowed.

(Before OAKLEY, CH. J., BOSWORTH, HOFFMAN and WOODRUFF, J.J.)

THE court decided as above stated, at a General Term held by the Justices above named. The facts of the case, so far as they affected the decision made, and the opinion of the court, by BOSWORTH, J., are fully reported in Abbott's Pr. R., vol. iv., p. 59; together with an opinion of HOFFMAN, J., stating the grounds of his concurrence in the general result, that the order appealed from should be reversed, and leave granted to the defendant to file a supplemental answer on the terms stated in the opinion of the court.

Wm. M. Evarts, for plaintiff.

A. L. Jordan, for defendant and appellant.

DRAPER, plaintiff and respondent v. SNOW, defendant and appellant.

George R. Hasewell entered into a written contract with the plaintiff, and the defendant signed a guaranty written thereon. The contract and guaranty read thus:—

"Penna. Zinc.

"350 shares, 3 $\frac{1}{2}$ B 60. New York, April 3d, 1854.

"I have purchased of Theo. S. Draper, three hundred and fifty shares of the stock of the Penna. and Leigh Zinc Co., at three and three-eighths dollars per share, payable and deliverable, buyer's option, in sixty days, with interest at the rate of six per cent. per annum.

GEO. R. HASEWELL."

"I guarantee the within contract.

GEO. M. SNOW."

Held, that neither the written words of the guaranty, nor that and the contract of Hasewell when considered together, expressed any consideration for the guaranty; and that, therefore, the latter being an agreement for the default of an-

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other was void. That an averment of extrinsic facts, which, if expressed in the instrument, or fairly imported by it, might constitute a consideration, did not obviate the difficulty.

To satisfy the statute of frauds, a guaranty by one person of the performance by another of his contract, must, in terms or by fair construction, disclose the actual consideration of the guaranty, or, at all events, a consideration sufficient to make a contract obligatory at law. When it does not disclose any consideration, the guaranty, as a contract, is absolutely void.

Judgment for defendant, on a demurrer to the complaint.

(Before OAKLEY, CH. J., BOSWORTH, WOODRUFF and SLOSSON, J.J.)

December 27, 1856.

THIS action comes before the court, on appeal by the defendant, from an order made by Ch. J. OAKLEY, overruling a demurrer to the plaintiff's amended complaint. It was in the words following, viz:—

The amended complaint of the above-named plaintiff, shows to the court—

That on the 3d day of April, 1854, he was in the actual possession of the certificates of 350 shares of the stock of the Pennsylvania and Lehigh Zinc Company.

That on the 3d day of April, 1854, one George R. Hasewell entered into a contract with the said plaintiff in the words and figures following, that is to say—

"PENNA. ZINC.

"350 shares, 3 $\frac{1}{2}$ B 60.

"New York, April 3d, 1854.

"I have purchased of Theo. S. Draper, 350 shares of the stock of the Penna. and Lehigh Zinc Co., at \$3 $\frac{1}{2}$ per share, payable and deliverable buyer's option in sixty days, with interest at the rate of six per cent. per annum.

GEO. R. HASEWELL."

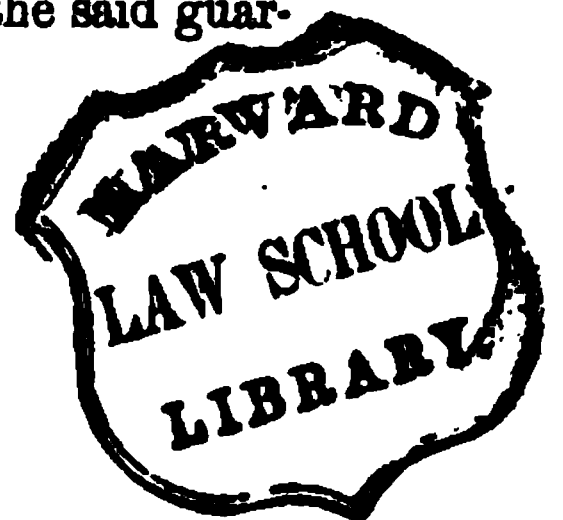
That before entering into the said contract with the said Hasewell, and as an express condition thereof, the said plaintiff required from the defendant above-named, his guaranty of the performance by the said Hasewell of the different stipulations on the part of the said Hasewell contained therein.

That therefore at the time of the making of the said contract above set forth, the said defendant indorsed thereupon his certain guaranty, in the words and figures following, viz.:

"I guarantee the within contract.

GEO. M. SNOW."

That thereupon in consideration of the giving of the said guar-



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anty by the said defendant as aforesaid, and not otherwise, and within the time limited therefor in the said contract, the said plaintiff delivered to the said Hasewell the aforesaid 350 shares of the said stock.

That neither the said Hasewell, nor the said defendant, have ever paid the said plaintiff therefor, as provided in the said contract, although often requested by the said plaintiff so to do.

Wherefore the said plaintiff demands judgment against the said defendant, for the sum of \$1181.25, with interest thereon, from the 3d day of June, 1854, besides the costs of this action.

The defendant demurred to the amended complaint, because it does not state facts sufficient to constitute a cause of action against the said defendant, and specified the following as grounds of objection:—

1st. That the said complaint sets forth as the foundation of the action against the defendant a collateral agreement, or special promise in writing of the defendant to answer for the debt, default, or miscarriage of another person, (one George R. Hasewell,) which agreement or promise in writing has, as appears by the said complaint, no consideration expressed therein.

2d. That no fact, or facts, are stated in the said complaint showing any breach of the contract of the said George R. Hasewell set forth in the said complaint, or any loss or damage thereby suffered, for which the defendant, under his collateral agreement, set forth in said complaint, is bound to answer, or is legally responsible.

An order was entered overruling the demurrer, and from that order the defendant appealed to the General Term.

W. H. Scott, for the plaintiff.

W. Bloomfield, for the defendant.

BY THE COURT. BOSWORTH, J.—This case and that of the *Union Bank v. Coster's Executors*, (3 Coms. 204,) are, in some respects, alike. In both cases the guaranty has no date. The court, in the *Union Bank v. Coster's Executors*, held, that the guaranty and the contract, on which it was written, should be deemed to have been made at the same time. (Id. 211.) In that case, they were proved to have been made at the same time. In the case

before us, the complaint alleges, and the demurrer admits, that they were made at the same time.

Do the material facts of the two cases correspond in other respects?

In the *Union Bank v. Coster's Executors* it was held, that the consideration of the guaranty appeared upon the instrument of which the guaranty was a part. That, applying to it the ordinary and settled rules of construction, it clearly appeared what the precise consideration of the guaranty was, and that the terms of the whole instrument necessarily excluded the idea that the consideration was, either in whole or in part, any thing else.

In that case, Heckscher & Coster agreed to accept and pay at maturity any drafts on them at sixty days' sight issued by Messrs. Kohn, Daron & Co., of New Orleans, and negotiated through their bank to the extent of \$25,000. And the defendant's guaranty read thus: "I hereby guarantee the due acceptance and payment of any draft issued in pursuance of the above credit."

When that guaranty was made, it guaranteed the payment of no pre-existing or co-existing debt of Heckscher & Coster.

The whole instrument was treated as being a request of each party signing it, addressed to the bank to which it was delivered, to purchase drafts that might be drawn in pursuance of it. Heckscher & Coster agreed to accept and pay such drafts at maturity. The defendant agreed that they would so accept and pay. The future purchase of such drafts, on the faith of the whole instrument, was the consideration, as well of the guaranty as of the special promise of Heckscher & Coster. That this was the whole actual consideration was as clearly expressed by the instrument itself as if it had been formally stated in the most explicit terms. The agreement of the defendant, therefore, was not only in writing, but the writing itself expressed the consideration of it.

In the case before us, the paper, or contract, signed by Hase-well, states that he had made a purchase of 385 shares of stock at a price which amounted to \$1,181²⁵/₁₀₀, the stock to be delivered and money paid at his option, in sixty days.

Irrespective of the extrinsic facts alleged in the complaint, a stranger to the transaction, looking at the whole instrument, and to that only, could not know whether the guaranty was an inducement to Draper to sell the stock, and was a constituent part of the

consideration for his contract to sell and deliver, or whether some special consideration was paid to Snow for making it, or whether it was, in fact, made without any consideration.

It is, indeed, apparent that the stock was to be delivered on a day subsequent to the date of the guarantee, and that the liability of Hasewell to accept it and pay for it became absolute on his executing the contract, and not before. (2 R. S. § 3.) The consideration of his contract is expressed by the writing which he signed. If the consideration of the guaranty is so clearly and fully disclosed by it that the court can see that it is a particular thing, and nothing else, then it is unnecessary to state it otherwise than by setting forth, in full, the whole instrument, of which the guaranty forms a part.

The plaintiff, instead of relying upon the terms of the whole instrument, as expressing the consideration of the guaranty, has deemed it expedient to allege, "that before entering into said contract with the said Hasewell, and as an express condition thereof, the said plaintiff required from the defendant above-named, his guaranty of the performance by the said Hasewell of the different stipulations on the part of the said Hasewell contained therein. That therefore at the time of the making of the said contract above set forth, the said defendant indorsed thereupon his certain guaranty, in the words and figures following, viz."

The plaintiff has therefore stated what was the actual consideration of the guaranty. Is the consideration, which is thus formally averred, clearly shown, by a just construction of the instrument itself, to be the actual, the whole, and the only consideration of the guaranty.

If it is not, and if some other consideration is equally consistent with the terms of the instrument, and all inferences which a proper construction of it will warrant, then the extrinsic facts alleged to show the actual consideration may be controverted by the answer, and a failure of the plaintiff to prove them would entitle the defendant to a verdict. An entire want of consideration would be a defence to the action, independent of the difficulty presented by the statute of frauds.

Suppose, upon the trial of an issue raised upon these allegations of extrinsic facts, it should appear that the plaintiff and Hasewell

had concluded their contract, and that Hasewell had executed and delivered it, before any thing had been said by either party upon the subject of having its performance by Hasewell guaranteed, and that the defendant, at the request of either, or of both, signed it, without any consideration therefor, paid, or agreed to be paid, could the plaintiff recover?

I think he could not recover, and that on the whole instrument, the necessary inference is, that the defendant guaranteed the performance by Hasewell of a contract existing when the guaranty was signed; and that it not only does not appear from the instrument itself, what was the actual precise consideration of the guaranty, but that it was made without any consideration is not repugnant to the fair and natural import of its terms.

In the *Union Bank v. Coster's Executors*, it was held, that it was apparent from the instrument itself, that the future purchase of drafts, on the faith of the guaranty, was the consideration of the guarantor's promise, that the drawers should accept and pay them at maturity.

The decision in *Brewster v. Silence* does not conflict with that made in the *Union Bank v. Coster's Executors*. That such is the judgment of the Court of Appeals, is evident from *Gates v. McKee*, (3 Kern. 232-238.)

In the former case, it was said that the note was the debt of the maker, and the guaranty was the engagement of the defendant that the maker should pay his note when it became due. There was nothing on the face of the whole instrument from which it could be inferred, with certainty, what the consideration of the guaranty was.

In *Brown v. Curtiss*, (2 Coms. 225,) the defendant, although his written contract was in the form of a guaranty, was held to have contracted directly with the plaintiff for his own benefit, and upon full consideration received by himself; and that on the particular facts of the case, his contract was an original and not a collateral one, and would have been good without any writing; that his contract was one made for the payment of a debt owing by himself, and not by a third person. Under that view of the case, it did not decide that the contract satisfied the statute, but that the case did not come within the statute. (Id. 229 and 234.)

In *Dunham v. Manrow*, (2 Coms. 533,) the decision was put on

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the ground that the case did not fall within the statute. Three of the seven Judges who heard the argument were of the opinion that the case came within the statute, and that the guaranty was void. None of them held, that if within the statute, the guaranty was valid.

In *Hall v. Palmer*, (2 Coms. 533,) the plaintiffs failed to recover. The three Judges who held that *Dunham v. Manrow* was a case within the statute, also held that the two cases were not distinguishable, and voted to affirm. Three of the four Judges who held that *Dunham v. Manrow* was not within the statute, voted to reverse, but on what ground the report of the case does not state. The other of the four voted to reverse, on the ground that the contract of the guarantor was upheld by no consideration in fact. (Id. 557.)

In *Brewster v. Silence*, all the Judges, except one, concurred in the judgment given. Unless there is a substantial distinction between that case and the present, the decision made in the former must control the one to be made in this.

We think no such distinction exists, and that the order appealed from should be reversed, and judgment given on the demurrer, in favor of the defendant.

Entertaining this opinion, we deem it unnecessary to consider the second point, made by the defendant, on the argument of this appeal.

Order appealed from reversed, and judgment ordered for the defendant.

CAZNEAU, et al. v. BRYANT, et al.

In an action of libel, where the defendant omits to answer, if it be shown to be highly probable that difficult questions of law may arise respecting the construction of the complaint, the legal effect of the default, upon its allegations as to the meaning of the words alleged to be libellous, and respecting the admissibility of evidence in mitigation, the court may, it seems, order the plaintiff's damages to be assessed by a jury at a stated Trial Term of the court, instead of directing them to be assessed by a sheriff's jury.

But when, after a default in not answering the complaint, a plaintiff moves for an order that his damages be assessed by a jury in open court, and that motion is denied, and an order is entered that they be assessed before a sheriff's jury,

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such decision is conclusive in respect to any grounds for the application then existing and then known to the moving party, unless leave be given, in the order which is made, to renew the motion on new or further affidavits. If the decision made was erroneous, it can only be reviewed and corrected on appeal. Such a rule does not preclude a party from moving to modify or vacate an order on facts occurring after it is made, or even on facts existing at the time, and discovered subsequently, when no laches can be imputed to the moving party. Such a motion should not be granted on allegations which, if true, would reflect discreditably upon the conduct of the adverse party, his counsel and the jury, when the court is satisfied upon all the affidavits that such allegations are wholly unfounded, and that there is nothing in what has transpired warranting the belief that the plaintiff will not have an impartial hearing.

(At SPECIAL TERM, Jan. 5, 1857. Before WOODRUFF, J.)

THE plaintiff moves for an order that her damages be assessed by a jury before a Judge of the court, at a Circuit or Trial Term, or before a special or struck jury, and that the order directing them to be assessed by a jury before the sheriff be vacated. One of the plaintiffs, being a married woman, brings this action, to recover damages for an article published of and concerning her by the defendants, and alleged to be libellous. The defendants having failed to answer, the plaintiff applied to the court for the relief demanded by the complaint. On that application she moved for an order that the damages be assessed by a jury at a stated Trial Term of the court. This application was denied, and an order made directing the damages to be assessed by a sheriff's jury.

The plaintiff issued a writ, directing an assessment before the sheriff, and gave notice of executing the same.

The plaintiff now moves, upon affidavits tending to show, as she alleges, that she cannot have an impartial assessment before the sheriff's jury, and without having first obtained leave to renew the application for an order that the writ of inquiry be executed before a Judge at a regular trial of the court, or before a special or struck jury, and that the order heretofore entered be vacated.

WOODRUFF, J.—The plaintiffs move that the writ of inquiry, issued upon the default of the defendants to answer, be executed before a Judge at a Trial Term of this court, or before a special or struck jury. The considerations urged by the plaintiffs' counsel, upon the argument of the motion, would, I think, induce me to order the writ of inquiry to be executed at the Trial Term if the

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case was before me upon an original application. (2 Johns. R. 107; 3 id. 153; 13 Wend. 658; Gra. Pr. 7952.)

But it appears by the papers that the same motion was heretofore made, to one of the Justices of this court, and the order refused, because sufficient reasons were not then, in his opinion, shown for a departure from the usual practice of the court. In respect to any grounds of the application then existing and then known to the moving party, this decision is conclusive. The Justices of this court do not separately review each other's decisions, upon motions of this description, nor entertain a second motion to the same effect as a former, unless upon leave given to renew in the order which it is, in effect, sought to rehear. If the party be not satisfied with the decision made upon the papers before the Judge, he should appeal. (Code, § 323.) If, through inadvertance, surprise, or for other reasons, he finds that the merits have been improperly or inaccurately exhibited on the hearing, he should procure leave to renew the application upon further papers, and this should be inserted in the order, (12 Wend. 290,) and should not acquiesce in the order and take proceedings under it. If he do thus proceed under the order, his motion in that regard will be deemed waived.

The consequence of this view of the subject is, that in regard to the alleged unsuitableness of sending an inquiry into the damage sustained by a female, by injury to her character, to a sheriff's jury, the probability that difficult questions of law may arise respecting the construction of the complaint, the legal effect of the default upon the allegations in the complaint as to the meaning of the alleged libellous words, and respecting the admissibility of evidence in mitigation, and all like grounds upon which this motion is urged, I am concluded by the former decision, and however I may deem it a proper case for an assessment before a Judge. I cannot reverse the former order upon any such grounds. The plaintiff acquiesced in the order, issued the writ directing an assessment by the sheriff, and noticed the same for execution.

This, however, would not prevent a motion to modify or vacate, founded on matters arising since the former motion, or matters since then discovered, (no laches being imputable to the plaintiffs.) In the affidavits submitted, the plaintiffs' attorney does undoubtedly state circumstances which, unexplained, might awaken sus-

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picion that previous conversation had been held with some of the jury attending at the time appointed for the assessment, and this led the plaintiffs' attorney to postpone the taking of the assessment and make this second application to the court. But these circumstances are not only fully explained, and most clearly exonerate the defendants, and their counsel and the jury, from any imputation of unfairness, but show that there is, in truth, no ground of suspicion. If any inference is warranted by the conversation disclosed, it is rather that there was a bias on the part of one or more of the jurors against, rather than for, the defendants. This, however, I do not think justified by what transpired.

To grant this motion, under such circumstances, would be unjustly reflecting upon the conduct of defendants, the counsel, and the jury, when I do not see, in what transpired, any thing to warrant the belief that the plaintiffs would not have had an impartial hearing.

If any irregularity shall arise, in the taking of the assessment, which works injustice, the party aggrieved will obtain relief. To anticipate this would be to place the court in a situation in which we could not, with propriety, send any case to the sheriff for assessment.

The motion must, therefore, be denied, but without costs.

WILDE v. A. and L. JOEL, and WM. LEEDS.

In ascertaining the damages on a reference upon the discharge of an injunction, the question arises, whether any other allowance can be made for costs or counsel fees, than that which the Code permits to be recovered by a successful party against his adversary?

"There may be allowed to the prevailing party, upon the judgment, certain sums by way of indemnity for his expenses in the action, which allowances are in this act termed costs." The measure of compensation between attorney and client is left to the agreement, express or implied, of the parties. (Code, § 803.)

Held, that the import of this provision is, that the unsuccessful party shall only be subjected to the charges specified as costs, where the action takes the ordinary course. But where there is a special contract as to damages, (and the injunction bond amounts to this in fact,) it will control; it will afford a new rule of estimate, and is not to be affected by the ordinary rates of allowance.

Another question then arises, whether, if counsel fees are allowable, they can only

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be allowed when actually paid, as it is the damage sustained which is to be repaid, not any contingent liability?

The Code has left the compensation of attorney and counsel to the operation of any agreement express or implied. Counsel can have the same remedy for services rendered, which they possessed before its passage.

If a party enjoined, has, by reason thereof incurred a liability, and the claim thereon is reasonable, a bond of indemnity would appear to cover such a liability as much as an actual advance; therefore, counsel fees, although unpaid, if reasonable, can be recovered in the shape of damages, in an action upon an injunction bond.

And then another important question arises, what is the effect of the Code as to the mode of ascertaining damages by an assessment under an order of reference? What does the report, if confirmed, settle? Can it be followed by a judgment for payment of the amount? If it can, as to the principal and party to the action, can it be as to the sureties? or is the only remedy an action on the undertaking?

Held, that under the provisions of the Code on this subject, a reference establishes the amount of damages, so that they become finally liquidated as between the parties. Where there are sureties, that fact shows the propriety of directing notice to be given to them. Legal defences, which are wholly independent, will arise, and may be taken in the action on the undertaking. There is no authority in the Code to order a judgment upon the bond for the amount ascertained by the reference to be payable, even against the plaintiff and obligor. It is, therefore, the safest course to bring an action upon the undertaking.

Although the provisions of the Revised Statutes, (2 R. S. 190, 195,) which are presumed to be in force, that the Chancellor shall direct the delivery of any bond executed under the provisions of that article to the person entitled to the benefit thereof, for prosecution, whenever the condition thereof shall be broken, or the circumstances of the case shall require such delivery, yet the court might well decline the delivery up of an undertaking on file in these cases, (see Code, § 423,) as an inspection of it is all that is necessary, in order to draw the complaint; and upon the trial the clerk can be subpoenaed to produce it in case of dispute. The items disallowed and allowed by the court *arbitrarily*, as damages on dissolving the injunction in this case, will be found stated at the conclusion of the opinion. (Reported in 15 How. Pr. R. 829.)

(At GENERAL TERM, January, 1857. Before DUER, BOSWORTH, HOFFMAN, SLOSSON and WOODRUFF, J.J.)

D. C. SCOTT, and others v. SAMUEL NEVIUS.

No order will be made on the mere motion of a receiver appointed under proceedings supplementary to an execution, that he may sell the estate of the judgment-debtor, when such estate consists only of the debtor's interest as *cestui que trust* under a will by which the testator conveys his property to executors in trust, with directions to convert it into money, and divide the money into a cer-

tain number of equal shares, and invest one of said shares and apply the interest and income thereof to the judgment-debtor during his natural life, and upon his death distribute the principal with all unappropriated income to and among the said judgment-debtore, then living lawful issue.

If the judgment-creditors, or such receiver as representing them, can derive any benefit from the provisions of such a will, it must be by a proceeding to which the executor is a party, and in which the benefit sought must be derived, not from a sale, but from an order in the nature of a sequestration of such portion of the annual income of the fund in question, as is not required for the suitable support and maintenance of the judgment-debtor, taking into view his condition in life, his health and other circumstances, and the condition of his family if any he have.

The interest of the judgment-debtor is inalienable. If there was already an accumulation of income in the hands of the executors, (which there is not,) so much of it might, probably, be reached by an order in this proceeding, or by a proceeding under section 294 of the Code, as was not necessary for the proper support and maintenance of the judgment-debtor, taking into view the considerations above suggested.

But a possible or probable future surplus cannot be anticipated and reached by a proceeding instituted for that purpose, before it has accrued or come into existence.

But this rule does not prevent a court, on a complaint properly framed, from giving such directions as will secure to a judgment-creditor such portion of the surplus as may remain after appropriating sufficient for the proper support of the debtor, to be ascertained and fixed, upon a reference ordered for that purpose. Motion denied.

(At CHAMBERS, JANUARY 7, 1857. Before WOODRUFF, J.)

THE motion made, and the circumstances under which it was made, and the facts on which it was based, are fully stated in the opinion of the Judge by whom it was heard and decided.

WOODRUFF, J.—Proceedings supplementary to execution having been instituted herein by the plaintiff, under section 292 of the Code of Procedure, an order of reference was made for the examination of the defendant, and the taking of proofs in relation to the property of the defendant, and by the report of the referee, and the examination taken before him, it appears that a brother of the defendant, Russell H. Nevius, heretofore, on or about November 26th, 1853, died, leaving a last will and testament, by which, among other things therein contained, he devised and bequeathed all the rest and residue of his estate, real and personal, to his executors therein named, to and for the purposes following, that is to say, to sell and convey the real estate in fee simple, and to convert the personal property into money, and after deducting

expenses, etc., to divide the net proceeds of all the said residuary estate into ten equal shares for the purposes of distribution as hereinafter directed.

Among those directions, the will proceeds: "35th. I order and direct my executors to invest one other of said shares, and to apply the interest and income thereof to my brother Samuel," (the above defendant,) "during his natural life, and upon his death, to distribute and pay over said principal sum, with all unappropriated income, to and among his then living lawful issue, each then living child of his taking one equal share thereof, and the issue of any deceased child of his taking by representation the share their parent would have taken if then living."

It further appears that the will has been proved, and letters testamentary granted to David H. Nevius, executor. That the estate has been so far converted and distributed, that about \$28,000 has been invested on account of that share of which the income is directed to be applied to the use of the above-named defendant; and the executor, on his examination as a witness, testifies that he thinks that when the residue of the estate is converted and distributed, "there will be at least \$22,000 more to be invested on the same account." The undivided portion of the estate, or a portion of it, is productive, and none of the income therefrom has yet been applied to the use of the defendant; but, as the executor testifies, "it goes into the general fund of the estate, to be paid over as principal or income hereafter, as he may be advised."

The income of the \$28,000 already distributed and invested is "about \$2,000 per annum," and all the income yet accrued and collected thereon has been paid over to the defendant, and the executor has advanced, he says, to the defendant about \$1,100 not yet realized from the share invested for his benefit.

A receiver, Mr. Oliver D. Cooke, having been appointed in the proceedings supplementary to execution, such receiver now applies by petition, stating that all the debts, property, equitable interests, rights, and things in action of the defendant, vested in him as such receiver, are those mentioned in the report of the referee, as above set forth. That the interest of the judgment creditors requires that the same should be sold, and that he, the receiver, is desirous to make the said sale, and close the trusts of his receivership, accord-

ing to law, without delay, and without incurring personal responsibility.

He therefore prays that an order be granted permitting him to make the said sale, and that such further order be made as the court may see fit to grant.

Notice of the presentation of this petition, and of the motion that the prayer be granted, is served upon the attorney for the defendant, and also upon the executor, David H. Nevius, both of whom appear by their counsel and oppose the motion.

Although this proceeding is in the name of the receiver only, by his own attorney, and is apparently taken for the purpose of closing his trust and relieving him from any further responsibility, and although no notice of the application appears by the papers to have been served upon the plaintiffs in the action, the judgment creditors, whose interests are chiefly concerned therein, the motion appeared to be urged on the argument as made for their benefit, and was, as I understand, supported by their counsel, in fact, and for the purpose of realizing, by a sale, or under the further relief prayed for, the satisfaction of their debt out of the fund in the hands of the executors.

It might be a summary disposition of this application to say, that if the judgment debtor has, under the will of his deceased brother, an interest which has passed to the receiver, and is the subject of sale and transfer, no injustice would be done by granting the order at the instance of the plaintiffs; and if he have no such interest, then granting the order would work no injustice, because the purchaser would buy at his peril, and would take nothing by his purchase.

But this would be a most unsatisfactory mode of disposing of the subject, and if, in the view of the court, the debtor has not such an interest as may be sold and transferred, the authority of the court ought not to be given to an act which would be of no substantial benefit to the creditor, and might be the cause of embarrassment and litigation to the executor.

My conclusions, after careful reflection on the subject, may be very briefly stated, and they lead to the result that no such order as is sought by the receiver, nor, indeed, any order upon the merits ought to be made in the present form of application to the court. If the creditors can derive any benefit from the provisions

of the will of the testator, above referred to, it must be by a proceeding to which the executor should be a party, and in which the benefit sought must be derived, not from a sale, but from an order in the nature of a sequestration of such portion of the annual income of the fund in question as is not required for the suitable support and maintenance of the judgment debtor, taking into view his condition in life, his health, and other circumstances, and the condition of his family, if any he have, in relation to all which I find nothing in the papers before me.

Although the will directs the whole estate to be converted into personalty, the interest of the *cestui que trust* is inalienable. Indeed, he takes no interest in the principal fund, except only the right to compel the execution of the trust, and the application of the income to his use. There is, therefore, nothing which can pass by assignment to the receiver, or which can be sold by him, so long as there is no income in the hands of the executor unappropriated. (1 R. S. [773] § 2; *ib.* [729] § 63.)

That the inalienability of the defendant's interest is the same as if the trust was of that estate only, see the above § 2, and also *Hallett v. Thompson*, (5 Paige, 583); *Kane v. Gott*, (24 Wend. 641); *Clute, et al. v. Bool*, (8 Paige, 83); *Degraw v. Clason*, (11 Paige, 136,) and *Rider v. Mason*, (4 Sandf. Ch. Rep. 352).

Although some doubt has been expressed in *Arnold v. Gilbert*, (5 Barb. S. Ct. Rep. 199,) and *Cruger v. Cruger*, (*id.* 267,) in regard to the extent to which the second section of 1 R. S. p. 773, above referred to, has made the interest of the *cestui que trust* in personal estate held in trust inalienable, I think the views expressed in the cases above cited are sound so far, at least, that when construed in connection with the statute in relation to creditor's bills, (2 R. S. p. 174, § 38,) which exempts property held in trust from discovery by creditor's bills, the most favorable claim the creditors can urge is, that the surplus beyond what is required for the maintenance of the debtor is alone liable.

The cases above referred to, however, satisfactorily show that such surplus is, under § 57, (1 Rev. Stat., p. 729,) liable to be reached in equity, and applied to the satisfaction of the debts of the *cestui que trust* trust.

The provision in the will directing the unappropriated income to be divided in, and among his issue, does not alter the case.

There is no discretion given to the executors to withhold any part of the income; they are directed to apply it all to his use. He could compel them to do so. (See above cases.) In any other view, it would be a direction to accumulate beyond the period allowed by law, which would be invalid, and might perhaps invalidate the whole trust.

The terms of this direction would be fully satisfied, by supposing the intent to be, that if, at the time of his death, some uncollected or unapplied balance remained in their hands, which the *cestui que trust* had not yet received, that should be divided with the principal; but this would not affect his right to require the continued application of the whole as it accrues, according to the first and chief direction contained in the provision.

The case of *Hallett v. Thompson*, *Clute v. Bool*, and *Degraw v. Clason*, also show that § 38 of the Statute, in relation to creditors' bills, forms no impediment to the reaching of this surplus by the creditors. See also *Bryan v. Knickerbocker*, (1 Barb. Ch. R. 427.)

But though of opinion that if there be a surplus in the present case, beyond what is reasonably necessary for the support of the debtor, it is liable to be taken to pay his debts, it is not to be reached by this motion. A proper action should be brought in the nature of a creditor's bill. If there was already an accumulation in the hands of the executors, it might doubtless be reached by an order in this proceeding, or by a proceeding under section 294; but it has been held that it cannot be anticipated. (*Clute v. Bool*, (& 1 Barb. Ch. 427.) But this does not import that, on a proper bill, such surplus may not, by proper directions, be secured to the creditor. On the contrary, the court may order a reference to ascertain and fix the amount necessary for his support, and direct the executors to pay over the surplus for the satisfaction of the judgment. Such was the course pursued in *Sillick v. Mason*, before Vice-Chancellor Sanford. (See 2 Barb. Ch. 79.)

Whether the income of the fund now in question is now, or will be hereafter, such as to yield any surplus, it is impossible upon the facts now before me to say. If an action be commenced hereafter by the plaintiffs to reach any such surplus, all proper inquiries will be directed into the condition, circumstances, and wants of the defendant and his family, if any he have.

The present motion must be denied, but, under the circumstances,

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without costs to the defendant. The conduct of the defendant on his examination, was of a character to deprive him personally of any claim to indulgence, certainly in respect to the matter of costs. But as to the executor who was called before the court by this petition, if it appeared that there was any fund in the hands of the receiver, he would be entitled to costs out of such fund; and had the papers disclosed that the creditor in fact made the present motion, it would be just that he should pay such costs. The receiver ought not to be required to pay costs personally, and therefore the motion will be denied, without costs.

GRAHAM v. COLBURN.

The Judge before whom proceedings supplementary to execution, under § 292 of the Code, are pending, has no power to order a commission to be issued for the examination of witnesses residing out of the state, to take testimony to be used on such proceedings. (Reported in 14 How. Pr. R. 52.)

(At SPECIAL TERM, February, 1857. Before BOSWORTH, J.)

MYERS v. MACHADO.

An averment in a complaint upon a protested bill of exchange, that the plaintiff is duly authorized to bring an action on behalf of a foreign banking company, (the owners of the bill,) as one of its registered officers, is a conclusion of law merely. He should set forth the existence and terms of the act under which the bank was organized, and an authority given to him as one of its registered officers to sue on its behalf. Without this the complaint is insufficient.

If it should appear that such an authority was given, the plaintiff could maintain the action in his own name, on behalf of the bank, not only on grounds of international comity, but as a trustee of an express trust, within a reasonable interpretation of the Code. (Reported in 14 How. Pr. R. 149.)

(At SPECIAL TERM, February, 1857. Before DUEB, J.)

Sheldon v. Wood.

COREY v. MANN.

A complaint for damages, in consequence of injuries received by the plaintiff, by the giving way of and falling down of a back stoop and stairs, on a certain building owned by the defendant, which alleged that said stoop and stairs were in a bad condition and repair; that the defendant, as owner, was bound to keep the premises, and especially the said stoop and stairs, in a good condition and repair, and had neglected and refused to do so; and that in consequence of such neglect and refusal, the plaintiff had sustained the injuries, (specifying them,) complained of, and demands judgment for \$5,000.

Held, bad on demurrer, because it appeared from the complaint, that the premises were occupied, not by the defendant, but by third persons, and consequently it was upon the tenants, and not upon the defendant, as owner and landlord, that the duty of keeping them in repair presumptively rested. Besides, the averment that the defendant was bound to repair, without stating any facts from which the obligation resulted, was plainly insufficient, it being a conclusion of law. (Reported in 14 How. Pr. R. 163.)

(At SPECIAL TERM, February, 1857. Before DUNKER, J.)

MURPHY v. G. F. & M. J. MERCHANT.

An allegation in the complaint that the note was made by the defendant, A—— B——, and “for a further inducement to the plaintiff to accept the same, was indorsed by the defendant, C—— D——, and was then delivered to and indorsed by the plaintiff,” *held*, insufficient to charge C—— D——, the indorser, with liability, where the note was made payable to order of the plaintiff.

It seems, that it is very doubtful whether any evidence of a parol agreement, varying the legal rights or obligation of the payee and second indorser, can be admitted. (Reported in 14 How. Pr. R. 189.)

(At SPECIAL TERM, February, 1857. Before DUNKER, J.)

SHELDON, et al. v. WOOD, et al.

Where a case, upon a report of referees, was made before the decision, (in 8 Kern. 841,) which does not conform to that decision, *held*, that it might be made to conform to that rule after the determination of the General Term on appeal.

Borrowe v. Milbank.

This court hold, that they have the power, under § 174 of the Code, to allow exceptions to the report of referees, etc., to be filed *nunc pro tunc*, after the ten days fixed by the Code (§ 272 [227]) have elapsed. (Reported in 14 How. Pr. R. 18.)*

(At SPECIAL TERM, March, 1857. Before HOFFMAN, J.)

LA FARGE v. THE LA FARGE FIRE INS. CO.

The president or other officer of a corporation which is a party to an action, is not bound to produce on the trial the books and papers of the corporation, under a *subpoena duces tecum*, issued by the adverse party.

He has no such property in or control over them as gives the right, or makes it his duty to produce them.

Their proper place is in the office, in which the business is transacted to which they relate. The proper remedy of a party who is entitled to use their contents as evidence, is to obtain sworn copies, or an inspection and copy, under the Revised Statutes or the Code. (Reported in 14 How. Pr. R. 26.)

(At GENERAL TERM, April, 1857. Before DUER, BOSWORTH,
and WOODRUFF, J.J.)

BORROWE v. MILBANK.

A lot of land, subject to a lease containing a covenant of renewal, at a rent to be agreed upon by the parties, or fixed by arbitration, is not an "unencumbered" lot, and when sold to the tenant holding the covenant such lot cannot be deemed to have been sold as an "unencumbered" lot.

* Notice of the judgment was served on the 13th of March, 1856. The motion for leave to file exceptions to the decision of the referee, *nunc pro tunc*, was made in March, 1857. The decision in *Sheldon, et al v. Wood*, was probably made on the strength of *Seeley v. Prichard*, (3 Duer, 669.) Subsequent to the latter decision the case of *Humphrey v. Chamberlin*, (1 Kern. 274,) was reported. At the June General Term, 1858, the Superior Court, held before Bosworth, Hoffman, Slosson, Woodruff, and Pierrepont, J.J., decided (Hoffman, J., dissenting), that the court had no power to enlarge the time prescribed by statute for taking an appeal from the Special Term. (The case of *Fry v. Bennett*, not yet reported). If that decision be correct, it may well be doubted whether the court has any more power to allow exceptions to the final decision of the court or of a referee to be filed, after the expiration of the time given by the Code, than it has to allow exceptions to be taken after judgment to a decision made during the progress of the trial.—
RER.

Burling v. Ogden.

To state, in a pleading, the nature and source of the information upon which the party relies in making an averment of facts on information and belief, does not vitiate an independent averment of such facts.

Nor does it detract from the force of such averment, that the clause of the pleading in which it occurs, refers, e. g., by the use of the word "therefore," to the antecedent clauses, in which the grounds of the information and belief are stated.

In an action brought to set aside an award of an umpire, to whom it was submitted to value a lot of land at its full and fair worth at private sale, considering the same as an "unencumbered lot," the complaint charged that his valuation "was not made upon considering the same as an unencumbered lot, but . . . at a less value, and such valuation was without his powers as umpire."

Held, upon demurrer, that the complaint sufficiently showed that the umpire had exceeded his authority.

When an arbitrator or umpire exceeds his authority, the effect of his act to avoid his award is the same, whether the error was committed consciously or through mistake. (Reported in 5 Abb. Pr. R. 28.)

(At GENERAL TERM, April, 1857. Before OAKLEY, Ch. J.,
DUEK, BOSWORTH, SLOSSON, and WOODRUFF, J.J.)

BURLING v. OGDEN.

On an analysis of § 899 of the Code, as amended on the 13th of April, 1857, it may be understood as follows:

1st. A party to an action or proceeding, and a party for whose immediate benefit a suit is prosecuted or defended, may be examined as a witness in his own behalf, the same as any other witness, in all cases, except when the adverse party, or adverse person in interest is not living, or, when the opposite party is an assignee, administrator, executor, or legal representative of a deceased person.

2d. Ten days' notice, in writing, of such examination must be given to the adverse party, specifying the points upon which the party or person is intended to be examined.

But in special proceedings of a summary nature, such reasonable notice shall be given, as shall be prescribed by the court or Judge.

3d. When notice of such examination is given, and the opposite party resides out of the jurisdiction of the court, such party may be examined by commission issued and executed as now provided by law.

4th. If a party or person in interest has been examined under this section, the other party or person in interest may offer himself as a witness in his own behalf, and shall be so received.

Now, the ten days' notice, and the points of examination, apply only to the party or person in interest offering himself as a witness, on the original application, in his own behalf—not to the opposite party; the law admits him, of course, and at large upon all the issues, whether his examination is upon commission or otherwise. (Reported in 14 How. Pr. R. 75.)

(At SPECIAL TERM, May, 1857. Before HOFFMAN, J.)

Conover v. Wood.

BERRIAN v. THE METHODIST SOCIETY IN NEW YORK.

The trustees of a religious corporation, and officers appointed by them, whose elections and appointments were in conformity with the formalities prescribed by the statute, and who have, in fact, acted, and are acting as such, are at least officers *de facto*, upon whom alone a valid service by process can be made to commence an action against such corporation.

When an action against such a corporation was commenced in the Superior Court by a service of summons upon persons claiming to be officers, but not in possession of the offices, and the officers *de facto*, after judgment by default, moved to vacate the judgment and set aside the proceedings, *held*,

1st. That all the proceedings must be set aside as irregular.

2d. That the title of the acting trustees could not be investigated on such a motion.

3d. That if they were claimed to be intruders, the proper proceedings to determine that question, and obtain such an adjudication, and their removal, and a new election in a lawful manner, must be taken and prosecuted elsewhere. That the Superior Court had no jurisdiction of an action or proceedings instituted to obtain such relief.

(At SPECIAL TERM, May, 1857. Before BOSWORTH, J.)

BOSWORTH, J., so held in this case, which is reported in 4 Abb. Pr. R. 424, and made an order vacating all the proceedings, with \$10 costs.

CONOVER v. WOOD.

It is contempt of court for a person who knows of the existence of an order for his arrest, in the hands of an officer intending to serve the same upon him, to prevent wilfully, and by open force, either made or directed, the service of such process.

But it is essential to constitute the offence in such case, that the party should be aware that the officer had an order which he might be desirous to execute.

Where, on an order to show cause why a party should not be punished for contempt in resisting the service of process, the opposing affidavits render it clear that the party was innocent of any intention to resist service, the court will not direct a reference to enable the moving party to introduce proofs of such intention. (Reported in 5 Abb. Pr. R. 84.)

(At SPECIAL TERM, June, 1857. Before HOFFMAN, J.)

BENNETT v. LE ROY.

No court in this state can rightfully enjoin a party from proceeding in a suit in another court of the state, having equal power to grant, in such suit, the relief sought by the complaint on which such injunction is asked.

If, in such a case, a party who has brought an action in one court be enjoined from proceeding further therein by an injunction issued from another court of co-ordinate powers, and if he proceed, notwithstanding such injunction, his proceedings will not be set aside for that cause, as irregular.

But, in furtherance of justice, the party prejudiced by them will be relieved on such terms as may be just, but only upon consenting to a dissolution of the injunction, so far as it may interfere with the further prosecution of such action.

(At SPECIAL TERM, JUNE, 1857. Before BOSWORTH, J.)

THIS case is reported in 5 Abb. Pr. R. p. 55, and in 14 How. Pr. R. 178. BOSWORTH, J., made an order on defendant's motion to vacate the judgment in this action, that he be allowed to answer in this action in twenty days, on his paying within that time the costs of entering the judgment, and of subsequent proceedings thereon, including the sheriff's fees on the execution issued on such judgment, and \$10 costs of opposing the motion, and on serving with the answer a stipulation that an order be entered in the action in the Supreme Court, (the court which had enjoined the plaintiff in the above action from proceeding further therein,) so far modifying the said injunction, as to leave the plaintiff in this action at liberty to proceed therein, and also providing that if the defendant did not avail himself of such conditions by complying therewith that this motion be denied with \$10 costs. The order so made was served on the 3d of July. On the same day, the defendant obtained from a Justice of the Supreme Court, an order in the action in that court, requiring the plaintiff and her attorneys to show cause why they should not be punished for a contempt of that court, by reason of having entered up judgment in the action in this court, and issued execution thereon.

The plaintiff, by her counsel, claiming that the motion thus about to be made in the Supreme Court, is a virtual refusal to accept, or an election not to accept the relief granted to the defendant by the order made by Justice Bosworth, upon the conditions annexed thereto; or that a motion to punish the plaintiff

 Moore v. Westervelt.

and her attorneys for the alleged contempt, is inconsistent with the spirit and intent of such order, and that the twenty days allowed to the defendant to stipulate and answer herein, were not given to enable him to take other measures in the mean time which might render the conditions, upon which the indulgence was granted to him, of no avail; subsequently, on notice, and on affidavits, showing the proceedings before Justice Bosworth and the proceedings taken by the defendant subsequent to the above-mentioned order, applied to Mr. Justice Woodruff for an order vacating the order vacating the judgment, and for other relief.

Mr. JUSTICE WOODRUFF, after hearing the parties, *held*, 1st. That the Superior Court would not require the defendant to waive his motion in the Supreme Court, as the condition on which he would be allowed to come in and answer in the action in this court. The question, whether any contempt of the Supreme Court had been committed by the plaintiff, must be left to be adjudicated in that court.

2d. That the order of the Superior Court, holding the judgment regular, yet allowing the defendant to come in upon terms, did not impair or affect the right of the defendant to pursue the proceedings instituted by him in the Supreme Court on the alleged contempt. When a court of equity has restrained a party from proceeding at law, and he, notwithstanding, proceeds, it is discretionary with the court of law, to sustain or vacate his proceedings therein. But the exercise of this discretion does not preclude the court of equity from inquiring into the contempt.

3d. That the former order of the Superior Court should be so modified as to require the defendant to elect *instantly*, instead of within twenty days, whether the judgment in this action should be continued in force, or opened on the terms specified. (Reported in 5 Abb. Pr. R. 156.)

(At SPECIAL TERM, June, 1857. Before BOSWORTH, J.)

MOORE v. WESTERVELT, late Sheriff.

The court has no power to order a judgment to be entered *nunc pro tunc*, as of a date prior to the actual judgment, to enable a party to affect the amount of his costs. A party is entitled to have his costs adjusted, according to the Code, as it existed at the time of the verdict, as it respects all items prior to that date, when the verdict is followed by a judgment entered thereon. The "recovery," which, by § 304, gives the right to such costs, means the verdict. (Reported in 14 How. Pr. R. 279.)

(At GENERAL TERM, July, 1857. Before DUKE, CH. J., HOFFMAN, WOODRUFF, and SLOSSON, J.J.)

WHITE v. THE MAYOR, ETC., OF NEW YORK.

Under section 172 of the Code, a plaintiff cannot amend his complaint more than once, as a matter of course, without leave of the court.

If he amends it before answer or demurrer, his right to amend of course is exhausted; and if his amended complaint is demurred to, he cannot amend it a second time without leave of the court. (Reported in 5 Abb. Pr. R. 322.)

(At SPECIAL TERM, October, 1857. Before BOSWORTH, J.)

HOPKINS v. ADAMS.

An action for the recovery of possession of specific personal property wrongfully detained, against a sole defendant, wholly abates if the defendant dies before verdict or judgment; and the court has no power in such case to order the action to be continued against the personal representatives of the defendant. (Reported in 5 Abb. Pr. R. 351.)

(At GENERAL TERM, October, 1857. Before DUER, CH. J., and BOSWORTH and WOODRUFF, J.J.)

GAUGHE v. LAROCHE.

On an application for an examination of an adverse party as a witness under section 891 of the Code, it is not the practice to make an order in such cases, that such party attend and be examined. The notice provided for by that section, specifying the time, place, and the Judge before whom the examination is to be heard, is sufficient without an order. The 892d section seems to require that a summons shall be issued by the Judge to compel the attendance of the party, such as was issued under the Revised Statutes, upon a conditional examination. (2 R. S. 393, § 10.)

Therefore, both the notice under section 891 of the Code, and the summons under the Revised Statutes, appear necessary, at least to lay the ground for a punishment, or process to punish, as for a contempt.

If the party refuse to attend and testify, he may be punished as for a contempt, and his complaint, answer, or reply may be stricken out. (§ 894.)

Thus, then, if the applicant finds it most important to have the actual examination, he may procure the attendance by the warrant under the statute. If he is content with the remedy given by the 894th section, he may adopt that, and have the pleadings of such party stricken out, and no doubt may proceed as for con-

Willett v. Stringer.

tempt, or may have either mode of redress. Where it is required that the party to be examined produce books and papers, the proper course is the service of a *subpoena duces tecum*. (Reported in 14 How. Pr. R. 451.)

(At SPECIAL TERM, October, 1857. Before HOFFMAN, J.)

CONSIDERANT v. BRISBANE.

In a complaint upon a written instrument, by which the defendant promised to pay to the plaintiff, "as executive agent of the company, Bureau, Guillon, Godin & Co., the sum of \$5000, for which I am to receive stock of said company, known as premium stock, (*actions a prime*), to the amount of \$5000, value received," it is necessary to allege that the stock was delivered, or an offer to deliver it, on the day on which the \$5000 was payable, or it will be bad on demurrer. Such an instrument is not a negotiable promissory note, and cannot be declared on as such. (Reported in 14 How. Pr. R. 487.)

(At GENERAL TERM, Oct., 1857. Before DUNE, CH. J., BOSWORTH, HOFFMAN, SLOSSON and WOODRUFF, J.J.)

PATTERSON v. PERRY, et al.

The basis of an order of interpleader to be made under section 122 of the Code, is the admission and office of the stakeholder. If he denies a liability beyond that admission, and such is claimed against him, it becomes a subject of litigation, and the remedy given by this section is not applicable. (Reported in 14 How. Pr. R. 505.)

(At SPECIAL TERM, Oct., 1857. Before HOFFMAN, J.)

WILLETT v. STRINGER, et al.

When, upon an appeal, an undertaking has been given, fully complying with the statute, and the appeal is perfected, the appellant does not remain responsible for the consequences of the misfortune and insolvency of his sureties.

But there is a substantial distinction between the case of an injunction and that of an appeal. In the case of an injunction, if the protection, by the security substituted for an injunction, should become entirely lost, as by the insolvency of

Dresser v. Van Pelt.

all the obligors, the right to the injunction would be restored; and if it is partially diminished, the question remains open, as it was originally, what will afford the party reasonable indemnity.

It is a question of judicial discretion, whether to allow a bond given on a claim of personal property, or for an injunction, to remain, where one surety has become insolvent and the remaining surety solvent, or direct that fresh surety be given. (Reported in 15 How. Pr. R. 310.)

(At SPECIAL TERM, Oct., 1856. Before HOFFMAN, J.)

HECKER v. MITCHELL.

It is no defence to an action on a promissory note that one of the plaintiffs has commenced an action upon the note in another state, although an attachment has been issued therein, which has been levied upon property sufficient to satisfy the demand.

In an action by an indorsee against the maker of a promissory note, an answer which denies knowledge, etc., sufficient to form a belief whether the allegation of the complaint that the payee of the note indorsed it to the plaintiff be true, is not frivolous.

Such answer may be false, but, if so, the remedy is by motion to strike it out, not by motion for judgment on account of its frivolousness.

Where an answer contained two defences, and the plaintiff moved for judgment for the frivolousness of the answer, and one defence was held good and the other frivolous;—*Held*, that the latter defence might be stricken out, under the notice that the plaintiff would ask other and further relief, etc. (Reported in 5 Abb. Pr. R. 453.)

(At SPECIAL TERM, Nov., 1857. Before WOODRUFF, J.)

DRESSER v. VAN PELT.

Where the defendant, by an order in the Supreme Court, in proceedings supplementary to execution, granted by a Justice of that court, in the first judicial district, was required to appear before the said Justice, (naming him,) or one of the other Justices of the said Supreme Court, and the defendant appeared before the said Justice first named on the return day, and an order of reference was made without objection to any irregularity in the order,

Held, assuming that the clause in the order to appear before the Justice making the order, or before one of the other Justices, etc., was an irregularity, it could not affect the substantial rights of the party; that the alternative clause was mere surplusage, and especially that the party could not set up the objection by plea or demurrer in another action.

Wesley v. Bennett.

The supplementary proceedings under section 292, *et seq.* sections of the Code, is a proceeding in an action to enforce a judgment, it is not a special proceeding within section 8 of the Code.

The true sense and interpretation of the 27th section of the Code appear to be this: A proceeding commenced in the first judicial district by any Judge competent to institute it therein may be continued in such district before any other Judge competent to have commenced it.

The case of the Knickerbocker Bank, (19 Barb. 602,) is authority decisive that an order, the title of which imports that it was made at Special Term, but actually made while the Judge was engaged in a trial, during an interval or interruption of it, is authorized and regular, although the order is one properly and ordinarily made at chambers.

When a Judge directs process, (*viz.*, an attachment,) to issue, and has jurisdiction to so order, and when any Judge of the same court, who is found at the place designated in the attachment, on the day specified in it for appearing thereto, has jurisdiction, when the place and time to appear are distinctly pointed out in such process, the mere fact that the party is directed by it to be brought before the Judge when holding a court at Special Term, instead of before the Judge at chambers, does not render the proceeding or process void. (Reported in 15 How. Pr. R. 19.)

(At GENERAL TERM, November, 1857. Before DUER, Ch. J., BOSWORTH, HOFFMAN, SLOSSON, and WOODRUFF, J.J.)

WESLEY v. BENNETT.

On demurrer to a complaint in an action for libel, containing the averment authorized by section 164 of the Code, that the words complained of were published "concerning the plaintiff," the court is bound to assume that the article referred to the plaintiff; and the plaintiff, under such a complaint, may prove they were spoken of and concerning him.

Where the words alleged in a complaint in an action for libel are fairly susceptible of a construction which would render them libellous, the complaint will be sustained upon demurrer, although the words may also be interpreted in a way which would render them innocent.

On appeal from an order rendering judgment on a demurrer as frivolous, the order will not be reversed unless the court are of opinion that the demurrer was well taken. It will not be reversed merely because the court may think it was not frivolous. *Laverty v. Griswold*, 12 N. Y. Leg. Obs. 316. (Reported in 5 Abb. Pr. R. 498.)

(At GENERAL TERM, December, 1857. Before BOSWORTH, HOFFMAN, SLOSSON, and WOODRUFF, J.J.)

LAWRENCE v. FARMERS' LOAN AND TRUST COMPANY, et al.

When an action is tried before the court without a jury, and a decision is made disposing of the case, except that a reference is directed to take an account, and an order is entered in conformity to the decision, an appeal from such order to review decisions made at the trial, will be dismissed. They can only be reviewed on an appeal from the judgment, which appeal cannot be brought until the account has been taken, and all questions arising upon it have been disposed of at Special Term. Until then, the order entered on the final decision made after the trial does not become a judgment within the meaning of that word as defined by the Code.

The "judgment" from which an appeal may be taken to the General Term, means the same thing as a judgment from which an appeal may be taken to the Court of Appeals. Appeal dismissed. (Reported in 15 How. Pr. R. 57.)

(At GENERAL TERM, Dec., 1857. Before BOSWORTH and WOODRUFF, J.J.)

JACOBS v. MARSHALL. THE SAME v. SMITH.

Any person sent by a defendant's attorney to serve an answer, which the plaintiff's attorney refuses to receive for the reason stated to such messenger at the time, that the period to answer has expired, is a proper person to whom to state the reason of such refusal. Giving to him that information, and sending the answer back by him, is doing all that a plaintiff's attorney can be properly required to do in such a case.

If after that, it is sent to the office of the plaintiff's attorney a second time and left there, he is not bound to return it a second time, and a judgment subsequently entered, as for want of answer, will not be set aside as irregular, by reason of the answer not having been returned a second time.

An order opening a regular judgment and default, is not appealable in respect to the terms imposed as a condition to the granting of such relief.

**(Before DUER, CH. J., BOSWORTH, HOFFMAN, SLOSSON and WOODRUFF, J.J.)
December 26, 1857.**

EACH action comes before the court on an appeal by the defendant from an order opening a judgment by default, and allowing the defendant to answer, the defendant being dissatisfied with the terms imposed as a condition to his being permitted to answer, he being precluded by such terms from setting up the defence of usury. When the answer was served, or attempted to be, it was

handed back to the boy or messenger, and he was told it would not be received because the time to answer had expired. The messenger, on reaching the office of defendant's attorney, was instructed to carry it back and re-serve it on plaintiff's attorney and leave it, and he did so, and plaintiff's attorney did not return it the second time. The affidavits tended to show, that the boy, when he returned with the answer after the first attempt to serve it, did not report the reason given by plaintiff's attorney for not accepting it, and it was urged that he was not an authorized agent to receive such communications, and that plaintiff's attorney, by not returning it when served the second time, had waived the default, and therefore the judgment subsequently entered, was irregular, and should have been set aside, with costs.

BY THE COURT. WOODRUFF, J.—We fully concur with the court at Special Term, in holding the defaults herein entirely regular. The affidavits on the part of the plaintiff not only show, that no extension of the time to plead was given, but that nothing was done or said which should have misled the defendants' attorneys.

And in once returning the answers, when served after the time to answer had expired, informing the messenger by whom the answers were sent, that they would not receive them because the time to answer had expired, the plaintiff's attorneys did all which the rules of practice or just notions of candor and fair dealing required. The agent employed by the defendants' attorney to make the service, was as competent to receive from the plaintiff's attorneys the reason why the answers were rejected, as he was to carry back the answers themselves.

Nor could the defendants' attorneys by again sending the answers to the office of the plaintiff's attorneys and forcing them upon them, make it their duty to send them back a second time. Having refused to receive them, and assigned a sufficient reason therefor, they had done all that good faith or professional fairness required, and the defendants could no more make it their duty to send back the answers a second time, than they could a third or fourth, or any greater number of times, by repeatedly sending the answers back so often as the plaintiff's attorneys returned them.

In regard to the terms imposed by the Judge as a condition

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of opening the defaults, it must suffice to say, that whatever we may think of the propriety of a discrimination between the defence of usury and any other, the conditions were in the discretion of the Judge, and we are not at liberty to review the exercise of that discretion. (1 Comstk. 43, and cases cited; 2 Code Rep. 41; 3 Code R. 141; 4 Sandf. Sup. Ct. R. 709.)

DEAN, plaintiff and appellant v. CHAMBERLIN, defendant and respondent.

In an action by one of eleven harbor-masters against another of them, who was appointed by each of them to collect the fees of the eleven harbor-masters, each being entitled to one-eleventh part of all the fees which might be earned, a complaint which stated these facts, and that the defendant accepted such appointment, and agreed with the plaintiff and the others of said harbor-masters severally, and become bound to account to them severally, for such fees as he should collect, and to pay to them severally their respective shares, and which alleged that he had collected from persons named, and also from persons unknown to the plaintiff, fees for which he had not accounted, and for which he refused to account, and the amounts of which, in some instances, the plaintiff could not state, and praying judgment that defendant account to the plaintiff, in writing, for all fees collected, and that plaintiff's share, when ascertained, be paid by the defendant, etc. *Held*, bad on demurrer, on the ground that there was a defect of parties, and that all the harbor-masters should be made parties to such an action.

(Before DUKE, Ch. J., BOSWORTH, HOFFMAN, SLOSSON, and WOODRUFF, J.J.)
December 26th, 1857

THIS action came before the court, on an appeal by the plaintiff from an order made by Mr. Justice Hoffman, sustaining a demurrer to the complaint.

The complaint states that the plaintiff, and the defendant, and nine others, were harbor-masters of the port of New York, from the 9th of April, 1850, until the 9th of April, 1855, duly appointed as such, under a statute of the state of New York, passed March 16, 1850.

That each of said harbor-masters employed the defendant to collect certain fees which should become due to them pursuant to such act: "That the defendant accepted the said employment and authority, and undertook and agreed with the plaintiff and the

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others of said harbor-masters severally and respectively, and became bound and liable to them severally and respectively, to account to them severally for such fees as he should collect and receive in the course of the said employment, and to pay to the plaintiff and to the others of said harbor-masters severally, their respective shares and interests in such fees; that the share and interest of the plaintiff in such fees was one-eleventh part thereof; that in pursuance of the said employment and authority, said defendant received a large amount of fees which he had collected, and which were due the harbor-masters aforesaid, under and by virtue of the provisions of the said act, during the holding of said office by said harbor-masters.

"That at various times the said defendant has paid to the plaintiff sundry sums of money on account of the share and interest of the plaintiff in said fees, and plaintiff supposed at the time when he ceased to be harbor-master, and when he received from defendant said sundry sums of money on account of his share and interest in the fees collected by defendant, that the defendant had accounted for all the sums of money that he had collected and received for and on account of said harbor-masters, but he has since been informed, and he declares the truth to be, that said defendant has received from Messrs. Ludlam & Pleasants, for harbor-masters' fees, due and payable on the steamers Roanoke and Jamestown, various numerous sums of money during the time when plaintiff was harbor-master as aforesaid, for which he has never accounted to plaintiff, and which he retains unlawfully in his possession; and plaintiff has been informed and believes that other sums of money have been received by defendant for harbor masters' fees during the time when said plaintiff and defendant were harbor-masters as aforesaid, for which he has never accounted, and which he now unlawfully detains; that plaintiff has requested an account from defendant of all such moneys received by him for the harbor-masters as aforesaid, which defendant has refused to give; that until the defendant shall have rendered an account of the said fees received by him as aforesaid, the plaintiff is unable to specify the precise sum due to him from the defendant for the plaintiff's share of said fees, but he alleges upon information and belief, that upon an accounting by the defendant, it would

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appear that there is still due to the plaintiff, from the defendant, a large sum of money.

“Therefore the plaintiff demands judgment, that the said defendant account to the plaintiff, in writing and under oath, under the direction of this court, for all sums of money received by him under the employment and authority aforesaid, and state the times respectively when said sums of money were received and the amounts thereof respectively, and the persons from whom received, and the names of the vessels on account of which said sums were received, that the plaintiff’s share and interest therein may be ascertained, and that the balance due to the plaintiff from the defendant by reason of the matters herein above stated may be adjusted and settled according to the plaintiff’s just and lawful rights, and that the defendant may be adjudged to pay to the plaintiff the balance so adjusted and settled, with costs of this action.”

The defendant demurred to the plaintiff’s complaint in this action, and for cause of demurrer showed,

1st. That the complaint does not show sufficient facts to constitute a cause of action.

2d. That there is a defect of parties plaintiff herein.

3d. That there is a defect of parties defendant herein.

The order appealed from decided and “adjudged that there is a defect of parties in the said action, and that the said defendant do have judgment in said action, unless the plaintiff within twenty days amend his complaint as to parties as advised, and in case the said complaint is so amended, the same to be without costs of said amendment.”

From that order the plaintiff appealed.

BY THE COURT. SLOSSON, J.—This is an appeal from an order at Special Term, sustaining a demurrer to the complaint for want of parties.

The action is plainly one for an account. The prayer of the complaint is for an accounting. The plaintiff treats it as an action at law to recover a specific amount, yet admits, in his complaint, that the amount of the moneys collected and received by the defendant, and to one-eleventh of which he is entitled, is unknown to him, and that the amount due him can only be ascertained on

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the rendering of an account by the defendant. It is not the case of a suit to recover an admitted balance or share after an accounting, nor to recover a fixed proportion of a sum certain, as where one of two joint owners of a chattel sells it for a round sum and receives the proceeds, in which case the other may have his action at law. (*Cochran v. Carrington*, 25 Wend. 409.)

In an equitable action the general rule is that all persons are to be made parties, if practicable, who have a legal or equitable interest in the subject matter of the suit, and may be affected by the judgment, and who are within the jurisdiction of the court. (2 Story's Eq. Juris. 741-2; Cooper's Eq. Pl. 33.) One object is to protect the defendant and prevent a multiplicity of writs.

In *Hallet v. Hallet*, (2 Paige, p. 19,) Chancellor Walworth states this to be the rule: "That if it appears, on the face of the plaintiff's bill, that an account of the whole fund must be taken, and that there are other parties interested in the distribution thereof, to whom the defendant would be bound to render a similar account, the latter may object that all who have a common interest with the plaintiff are not before the court."

In cases where it would be practically inconvenient to make all who have an interest in the fund parties in fact, the plaintiff, under the old practice, was allowed to file the bill in his own behalf and in behalf of all others standing in the same situation with himself, who might elect to come in and be made parties, and bear their portion of the expenses.

In the present case there are nine other harbor-masters, besides the plaintiff and defendant, equally interested in the fund. If one may sue for his proportion, each of the others may also sue.

Under the act under which they were appointed, (March 16, 1850,) the fees collected belonged to all, though each was entitled to an equal proportion. The defendant was appointed by each of them, as is alleged, to collect certain fees and, as is alleged, agreed to account and pay to each one, severally, his proportion. It would be straining the sense of this phraseology, I think, to construe it as an agreement by the defendant to render to each one a separate account of his stewardship. The natural and proper meaning of the undertaking is, that he would render to all who had employed him an account of the moneys he should collect, and pay to each his several proportion. After such an accounting, an assumpsit

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would lie by each for his share. But, if the language be taken literally, still if the court sees that a multiplicity of suits will be avoided by making all parties to a single action, it will require them to be brought in.

As the sum to be divided is not ascertained, each party has an interest in having the exact amount determined. It is true the defendant cannot be made to account for more than he has received, but he has a right to say that he ought not to be put to the proof of that more than once.

If the complaint had alleged that all the other harbor-masters had been paid their proportions the case would be different, but this cannot be inferred; on the contrary, the silence of the complaint on that point, in connection with the allegations which show that others were equally interested with the plaintiff in the fund, and that the defendant has never accounted for what he has received, necessarily implies that he is still indebted to all.

We think the demurrer for defect of parties, well taken.

Order affirmed, with costs of appeal.

CASSARD v. HINMAN. SAME v. SAME.

A petition by one party for an order directing the other party to make a discovery of books and papers in his possession, will not be granted when it prays for a discovery generally of all the books, papers, and correspondence of the adverse party, containing entries, during a period of several years, relating to purchases of a specified commodity. A petition must show that entries affecting or throwing some light on the matters in controversy exist, or enough to call upon the adverse party to answer whether they do or not, that they are material, and state enough, if not denied, so that the court can see they are material, in addition to stating the other matters prescribed by the rules regulating such applications.

Motion denied.

(December 28, 1857. Before Slosson, J.)

THE opinion in this case gives an idea of the terms and contents of the petition sufficiently accurate to make it unnecessary to state them more particularly.

SLOSSON J.—It is impossible for the court to perceive, from

Bussing v. Thompson.

any thing stated in this petition, in what respect the discovery asked for can be material to the defence in these actions. It proposes a roving investigation into all the books, papers, and correspondence of the plaintiff during a period of some eight or nine months, relating to, or in which are contained entries in respect to pork contracts entered into by him during that period, not with the defendant, but with all or any persons whatever; and it is not even intimated that such discovery, if allowed, would disclose a single gaming or illegal contract. It asks also for the correspondence between the plaintiff and Nathan, the mutual agent of the plaintiff and defendant in effecting the contracts in controversy in these suits, without giving the dates of the letters or suggesting a single fact which the defendant is informed or believes such correspondence will disclose.

There is nothing asked for by way of discovery in this petition which cannot, if competent to be proved at all, be as well proved by the examination of the plaintiff himself, or of Nathan, or other witnesses.

The allegation that these books, papers, documents, and letters "relate to the merits of the actions" is wholly insufficient. The petition must show in what respect they relate to the merits, that the court may judge on that subject for itself.

There is no adjudged case upon which this motion can be sustained, and none that I have met with in which such a sweeping, roving search has been asked for at the hands of the court. (*Stalker v. Gaunt*, 12 Leg. Obs. 132; *Davis v. Dunham*, 13 Pr. R. 425; *Com. Bk. Alb. v. Dunham*, id. 541; *Hoyt v. Am. Exch. Bk.* 1 Duer, 652.)

The motion must be denied, with \$10 costs.

BUSSING, et al. v. THOMPSON.

The defendant, prosecuting the business of a banker, the plaintiffs, in November, 1855, employed him to act as their banker, receive their deposits, collect their bills, etc., and credit them with the amount, agreeing he might use the moneys and he agreeing to pay their drafts on him when presented, and interest on the balances at the rate of five per cent. They continued to act under this agreement, and on the 13th of August, 1857, the plaintiffs remitted to the defendant

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a draft for \$4000, payable the 25th, to be collected and passed to their credit, under this agreement. Defendant received it on the 15th, and collected it on the 25th, and used the money. On the 24th, he knew he was insolvent, and on the morning of the 25th, avowed his purpose to suspend, and did soon after the \$4000 was collected.

Held, that defendant did not receive the money in a fiduciary capacity. His failure after he received, and before the maturity of the draft, did not annul the agreement between him and plaintiff or convert him into a trustee.

Also, that he did not convert the money to his own use "wrongfully," within the meaning of that word, as used in the Code; nor was he guilty, in judgment of law, of a fraud in using the money; nor was he guilty of a fraud in incurring the obligation to pay the \$4000 to the plaintiffs.

Therefore, also *held*, that the defendant could not be held to bail in an action to recover the \$4000, he having failed to pay it, on a demand made subsequent to his failure. (Reported in 15 How. Pr. R. 97.)

(At GENERAL TERM, Jan., 1858. Before DUEB, CH. J., BOSWORTH, HOFFMAN, SLOSSON and WOODRUFF, J.J.)

LAUGHRAN and DILLON v. ORSER, Sheriff.

If an action be brought in a court of record against a sheriff for not returning an execution, and the plaintiff recovers less than \$50 damages, he must pay the costs of the action. It is not one of the actions of which, according to section 54 of the Code, a Justice of the peace has no jurisdiction. This result must follow, even if it be conceded that section 53 is not sufficiently comprehensive to confer jurisdiction of such an action on a Justice. Subdivision 3, of section 304, cannot be construed as referring to section 53 as well as to section 54.

Section 53 does not grant jurisdiction of any action in which the amount claimed exceeds \$100. Section 304 does not permit the amount claimed to affect the question of liability for costs, but only the amount recovered, unless the action be one of those enumerated in section 54, or one of those in which, by sub. 4 of section 304, a party recovering less than \$50 will recover as much costs as damages. (Reported in 15 How. Pr. R. 281.)

(At GENERAL TERM, February, 1858. Before BOSWORTH, HOFFMAN, WOODRUFF and PIERREPONT, J.J.)

FULLER v. READ, commenced October 28, 1857; READ v. FULLER, commenced October 31, 1857.

Fuller having a cause of action against Read, sued him; Read, after that, sued Fuller on a demand which fell due after Fuller's suit was brought, and Fuller, in

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his answer set up as a counter-claim, the cause of action on which his suit was brought.

Held, that Fuller, in that stage of the suits, could not be compelled to elect to prosecute his claim in only one of such suits, and to abide by such election. That the court should not obstruct the orderly course of proceeding in either action, until both were at issue on the merits.

If it then appeared that the merits of both could be fully tried, and full relief given in any one suit, the proceedings might properly be stayed in the other until that one was tried; that the pendency of the suit first brought was no bar to the right of the plaintiff therein to set up the matter of it as a defence to the suit subsequently brought against himself. (Reported in 15 How. Pr. R. 236.)

(At GENERAL TERM, February, 1857. Before BOSWORTH, SLOSSON, WOODRUFF and PIERREPONT, J.J.)

JOHN KAMENA v. WANNER and THOMPSON.

When a constable, on an attachment issued out of a Justice's court against one person, seizes and removes property found in the possession of another, and the latter claiming to be the owner, and desiring to so proceed under Part 3, Title 4, § 81 of the Revised Statutes, as to perfect a right to have the property restored to his possession, he must, among other things, give a bond in a penalty equal to double the value of the property attached, though such value be \$2800, and the debt which it was seized to satisfy be only \$421. In such a case a bond in the penalty of \$1000, though correct in all other respects, and duly approved and tendered to the constable attaching, will not make it his duty to deliver the property attached to such claimant, and consequently, will not make his refusal to deliver it to such claimant a wrongful act on his part, for which such claimant can maintain an action against him.

(Before BOSWORTH, SLOSSON, WOODRUFF, and PIERREPONT, J.J.)
March Term, 1858.

THIS action comes before the court on an appeal taken by the defendant, Wanner, to an order made at Special Term, overruling his demurrer to the amended complaint, and to the second cause of action stated therein.

The complaint stated as a first cause of action, that, on the 5th of February, 1857, the defendant, Thompson, being a constable, by virtue of an attachment issued out of the Marine Court, of the city of New York, in favor of the defendant, *Wanner v. one Waltje Kamena*, to collect \$421 and interest, from November 10, 1856, "at the instigation, under the instructions, and in the presence of

the said defendant Wanner, attached, (certain personal property of the plaintiff, of the value of \$2800,) and removed the same from (the possession of the plaintiff,) and converted the same to the use of said defendant."

It then stated as a second cause of action, that after such seizure, and on the 12th of February, 1857, the plaintiff claimed the said property as owner, and to obtain possession of it, made and executed with sureties a bond to said Wanner, in the penal sum of \$1000, payable to him or his attorney, executors, administrators, or assigns, which bond recited the seizure of said property by Thompson, a constable, by virtue of said attachment, and that the plaintiff claims the goods so attached as his property, and contained a condition, that "in a suit to be brought on this obligation within three months from the date hereof, the said John Kamena, (the plaintiff,) shall establish that he was the owner of the said goods at the time of the said seizure, and in the case of his failure to do it, the said John Kamena shall pay the value of the said goods and chattels with the interest, then his obligation to be void, otherwise of force." That said bond, so executed, was thereupon tendered to the Justice of the Marine Court who issued said attachment, and afterwards to A. A. Thompson, also a Justice of that court, for their approval; that each of them indorsed his approval thereon, and on the 3d of May, 1857, the plaintiff tendered and delivered to the defendant, Thompson, the said bond so approved, and demanded a return and delivery to the plaintiff of the property so attached, "but said defendant, Thompson, acting under the advice and instruction of said defendant, Wanner, and at his special instigation, at all times wrongfully refused to accept said bond and return said property." The complaint then stated the value of the property to be \$2800, and the damages to the plaintiff "arising from said seizure and conversion, (to be) the further sum of \$500," and concluded by demanding judgment "against the said defendant for the sum of" \$3300, with the costs of the action.

The defendant, Wanner, put in an answer to the first cause of action, denying the allegations of the complaint in that behalf, which answer also alleged that the bond, so approved and tendered, did not conform to the requirements of the Statute, nor confer a right on the plaintiff to have a return of the property, or

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a right of action against either defendant, by reason of the refusal to return the property.

The same defendant also demurred "to the said amended complaint and second specification of cause of action," on the ground that several causes of action have been improperly united. The first cause of action being one against both defendants as joint *tort-feasors*, and the second being against Thompson only for his unjust refusal to return the property, a cause of action which does not affect Wanner.

Mr. Justice Hoffman, on hearing the demurrer at Special Term, overruled it, and ordered judgment for the plaintiff thereon. From that order (or judgment) the defendant, Wanner, appealed to the General Term.

John S. Jenness, for plaintiff and respondent.

James M. Sheehan, for Wanner, appellant.

BY THE COURT. PIERREPONT, J.—This is an appeal from an order of the Special Term overruling a demurrer. The plaintiff sues Thompson, a constable, and one Wanner, who was plaintiff in an attachment against Waltje Kamena; and alleges in the second count of his complaint, that the constable having levied upon the plaintiff's property by virtue of an attachment, that he, the plaintiff, as claimant of the property, tendered a bond in conformity with the statute, and the said constable refused to deliver to him the property, but sold the same, and that Wanner instigated the constable to these acts; that the bond tendered was in the penal sum of \$1000, and that the property so seized and required to be delivered on the tender of the bond was of the value of \$2800. The complaint prays judgment in the sum of \$3300.

The defendant Wanner, demurs to this count.

The bond required by the 31st section of Part III. Title 4 of the Revised Statutes, requires that the bond shall be "in a penalty double the value of the property attached." Section 34 shows clearly that the statute contemplates protection to the real owner of the property, as well as to the plaintiff, in the attachment. A case which may often happen will illustrate the importance of this provision in the law.

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The defendant in the attachment is tenant of the furnished house of A, the furniture is seized by the constable on an attachment against the tenant to satisfy a claim of \$400; the constable not knowing how the furniture will sell, and quite ignorant of its value, seizes the whole, which proves to be worth \$5000. A stranger claims the furniture, gives a bond, approved in the sum of \$800, and takes the property. The real owner learning that his property has been thus taken, goes to the constable to replevy it, and finds in its stead a bond of \$800, and that the furniture has gone no one knows whither. But if the construction for which the plaintiff contends be the true one, the constable could not refuse making the delivery to such claimant, although he had, meanwhile, learned that the property attached was worth ten times the penalty of the bond (§ 31 and 32). Taking the construction of the statute, which we are disposed to give it, this count of the complaint, divested of all verbiage and circumlocution, may be fairly stated thus:

The plaintiff complains that the defendant Thompson, being a constable, seized by virtue of an attachment, (against Waltje Kamena,) property of the plaintiff of the value of \$2800; the plaintiff claimed the same and tendered to the said constable a bond duly executed and approved in the sum of \$1000, according to the statute, which requires that said bond should be in the sum of \$5600; that said constable refused to deliver the property on such tender of the approved bond, and that the defendant Wanner advised and instigated the constable to said acts; wherefore, the plaintiff demands judgment against the said defendants for the sum of \$2800, the value of the property, and \$500 damages, besides interest and costs.

We think such a complaint does not state facts sufficient to make the constable liable; and it follows that Wanner could not be liable for advising the constable to act according to law.

The demurrer must be sustained, and the order of the Special Term reversed with costs.

McAllister v. Pond.

GREEN v. WOOD.

Section 391 of the Code, gives to either party to an action, an option to have an adverse party examined before, instead of examining him at the trial. It is error to deny to the party claiming it, the right to have such an examination, on the mere ground that the party sought to be examined, prefers to be examined at the trial, and offers to stipulate to then attend, so that his examination can then be had. The fact that other suits against the party sought to be examined are pending, which are brought by other plaintiffs, and depend upon the same general facts, is not such cause as will justify an order exempting a defendant from examination before the trial. To refuse to compel a defendant to submit to an examination before the trial, merely because he prefers to be examined at the trial, would make it optional with the defendant, whether he would be examined before the trial or not, whereas the Code gives the option to the party who wishes to examine his adversary, whether the examination shall be had before or at the trial. (Reported in 15 How. Pr. R. 338.)

(At GENERAL TERM, March 20, 1857. Before BOSWORTH, HOFFMAN, WOODRUFF, and PIERREPONT, J. J.)

MCALLISTER v. POND, et al.

In a proceeding for the discovery of books and papers, (which is a summary and, in some respects, an extraordinary remedy,) the court is to be governed by the principles and practice of the (late) Court of Chancery, in compelling discovery. So say the Revised Statutes, (2 R. S. 197, § 31.) In this respect there is no reason to believe that the legislature intended to introduce any new rule, when the provisions of § 388 of the Code were enacted.

The rules of the court, (8, 9, 10, etc.) contemplate the setting forth, by petition, of facts and circumstances which show that the discovery is necessary, and that the party applying therefor is entitled to demand it of the adverse party. A mere statement that in the opinion of counsel the discovery sought is necessary, will not suffice. Such a statement is requisite, but it is cumulative.

One of the first facts which should appear on an application for a discovery of books and papers, for the purpose of preparing for trial, is, that the applicant has not in his possession the same information, or if he has, that he has not the means of establishing, by other available proof, the contents of such books or papers.

In this case it in no wise appeared, by the petition, that the plaintiff was ignorant of any particular which was necessary to enable him to prepare for trial, or which was contained in the books and papers sought to be produced. There was a failure to show a want of the requisite information to enable the plaintiff to prepare for trial; and it was not stated that the plaintiff had any need of

Lord v. Vandenburg.

the defendants' books and papers, for the purpose of establishing the particulars of the accounts between the parties; nor that he could not prove, without the production sought, every fact which was material to his case.

And besides, it appeared that the books of the defendants, of which discovery was sought, had been freely offered to the plaintiff's attorney for examination and inspection, and he had omitted to avail himself of the opportunity. Motion denied. (Reported in 15 How. Pr. R. 299.)

(At SPECIAL TERM, March, 1858. Before WOODRUFF, J.)

LORD, et al. v. VANDENBURGH, et al.

Where an attorney resides in one town or city, and has his office for the transaction of business in another, how shall persons in the latter place serve papers upon him if his office be closed? They are not bound to follow him to his residence and make manual delivery there. If bound to serve papers at his residence at all, in such case, service by mail is sufficient.

In such case, if, in compliance with the fifth of the rules of court, the attorney adds the place of his office to his name, he is concluded thereby. Such place will be deemed his residence for the purpose of such service, so that persons desiring to make service will not be bound to go or send to another town, though being his actual residence.

And where the paper to be served is an answer in a cause in which the summons, (in obedience to § 128 of the Code,) specifies the place where the answer was required to be served on the plaintiff's attorney, the defendant is not bound to serve his answer in any other place. And if the attorney's office is closed and he does not reside in that place, an endeavor to serve at the office, within the time allowed to answer, followed by an actual service within a reasonable time afterwards, when the office is open, will be regarded as a sufficient service.

A party is not bound to make an impracticable service.

Where the plaintiff's attorney issued a summons requiring the answer to be served on him at the city of New York, and added to his subscription "195 Broadway," that being his office, and, on the last day for answering, the defendants' attorney, at about four o'clock, P. M., sent the answer to his office, and found it closed, the plaintiffs' attorney having left the city for his residence at Flushing; and again, the next day, the defendants' attorney sent the answer to his office, and the plaintiffs' attorney refused to receive it, having in fact entered up judgment and issued execution that morning.

Held, that the defendants' attorney was regular, and the judgment, etc., irregular; and the judgment and execution were set aside, with costs. (Reported in 15 How. Pr. R. 81-8.)

(At GENERAL TERM, March 20, 1858. Before BOSWORTH, HOFFMAN, WOODRUFF and PIERREPONT, J.J.)

INDEX.

A.

ACCOUNT

See page 691.

ACTION.

1. The deceased was an engineer in the employ of the New Haven Railroad Company and was killed by the accident of the cars which he was running being thrown off the tract of the road; the action was brought by his widow, as his administratrix, for the recovery of damages, under the statute, and was founded on the allegations that the accident was caused, partly by the negligence of a switch-tender in the employ of the defendants, and partly by the insufficiency of the switch itself. Both these questions of fact were submitted to the jury, and were found by them in favor of the plaintiff.

The Judge, upon the trial, charged the jury that, although the deceased was in the employ of the New York and New Haven R. R. Co., yet if he was running their train upon the defendants' railroad, and by reason of the negligence of the switch-tender employed by the defendants, that train was thrown from the track, and his death thus caused without any negligence on his part concurring to produce the accident, the defendants were responsible in the action.

To this portion of the charge the counsel for the defendants excepted.

The Judge also charged the jury, that if

there was on the part of the defendants a want of reasonable skill and prudence in the construction of their road at the place of the accident, or a neglect on their part to adopt a useful improvement in the construction of the switch, by which the danger of the accident would have been materially reduced, and which improvement was known to the defendants, and they had it in their power to apply it, the defendants were liable if their omission to adopt the improvement caused the accident, unless there was negligence on the part of the deceased that concurred to produce the result.

To this part of the charge the counsel for the defendants also excepted.

Held, that the exceptions were not well taken, the charge of the Judge being, in point of law, entirely correct, and being directly applicable to the questions of fact raised by the evidence.

2. *Held*, further, that the finding of the jury upon the questions of fact, specially submitted to them, was fully sustained by the evidence. *Smith, Administratrix, etc. v. New York and Harlem R. R. Co.*, 225

8. The defendant sued Brooks & Hopkins, had an attachment issued, and on it seized the property in question, being the property of the plaintiff's testator. T. Jackson, and Carr & Burnett, and S. V. Moers, subsequently and severally sued Brooks & Hopkins, and had attachments issued, which were levied on the same property, but without their direction. Judgments were obtained, and executions issued in all of said actions. The sheriff refused to

- sell on either of the executions, unless indemnified for so doing. Carr & Burnett executed to the sheriff an indemnity bond in their own suit, and executed as sureties one given by Moers in his suit, by the terms of each of which the sheriff was indemnified against the consequences of levying and selling, under the executions, in those two actions. Johnson having, in his lifetime, sued Carr & Burnett for a forcible and wrongful taking of the property in question, the plaintiff, on the 31st of August, 1855, released them from all causes of action whatever. The present action was commenced about the 1st of July, 1852, after all the executions had been issued to the sheriff, and before the execution of the indemnity bonds. *Townsend, Executor. v. Hoppock*, 499
4. Held, that the cause of action against Hoppock was perfect the moment the property was seized on his attachment, by his orders. That Carr & Burnett, not having participated in that wrongful taking, the release to them could not be construed to include and discharge that cause of action, and, consequently, was no defence to it. *id.*
 5. They and Hoppock were not joint wrong-doers, in respect to the taking of the property under Hoppock's attachment. That taking being the ground of the present action, a release of Carr & Burnett from all claims and demands against them, does not extinguish or affect Hoppock's liability to the plaintiff. *id.*
 6. A sale and delivery of property by M. to C. and T., and an agreement by the latter to pay, as part of its price, to E. a sum named, on account of M.'s indebtedness to E., is a valid contract, on which E. can sue in his own name, and recover the sum so agreed to be paid to him. *Earle v. Crane*, 564
 7. If, after the consummation of such a sale, by a delivery and acceptance of the property under it, M. executes a formal bill of sale of the property to C. and T. for a pecuniary consideration expressed in the bill of sale, and signs a paper stating that he consents to sell such property for his indebtedness to C. and T., the fact of the subsequent execution of such papers does not render it incompetent for E. to establish by parol the actual agreement under which the property was sold, delivered, and accepted. 564
 8. The execution of a bill of sale, expressing a pecuniary consideration, and a delivery of it with the property, present no obstacle to showing that such consideration was not wholly pecuniary, but consisted in fact of a special agreement in which E. is interested, and its non-performance to E.'s damage. *id.*
 9. Whether, if the executory contract to sell and deliver had been rescinded before it was obligatory on either party to it, and it should appear that the delivery of the goods, and the execution and delivery of the bill of sale, and of the receipt, were contemporaneous acts, they would preclude the parties to them, or the plaintiff, from showing the agreement to have been such as the complaint states. *Quere id.*
 10. When a constable, on an attachment issued out of a Justice's court against one person, seizes and removes property found in the possession of another, and the latter claiming to be the owner, and desiring to so proceed under Part 3, Title 4, § 31 of the Revised Statutes, as to perfect a right to have the property restored to his possession, he must, among other things, give a bond in a penalty equal to double the value of the property attached, though such value be \$2800, and the debt which it was seized to satisfy be only \$421. In such a case a bond in the penalty of \$1000, though correct in all other respects, and duly approved and tendered to the constable attaching, will not make it his duty to deliver the property attached to such claimant, and consequently, will not make his refusal to deliver it to such claimant a wrongful act on his part, for which such claimant can maintain an action against him. *John Kanens v. Wanner and Thompson*, 693
- See *ANTE*, pp. 225, 315, 351, 446, 549, 629, and (679, *Corey v.*)

AGREEMENT.

1. This case turned entirely upon the construction of certain agreements between the plaintiff Goodyear and the defendant Chaffee, and the court held that, by the true construction of these agreements, the plaintiff Goodyear was entitled to the relief sought. *Goodyear, et al. v. Day & Chaffee*, 154

2. An executed parol agreement, upon a sufficient consideration, may operate to discharge the stipulations of a sealed contract.

Held, upon the evidence, that such a discharge or waiver was established, by which a claim for damages in supplying the stone for a building (which was provided for in the contract) was surrendered upon a new agreement. *Townsend v. Empire Stone-Dressing Co., et al.*, 208

3. The plaintiff had delivered to a third party a bond and mortgage in a specified sum, to be held as security for the payment of the contract price of stone to be supplied under a contract. The defendants subsequently supplied other stone under a separate agreement, and the defendants alleged that it was orally agreed that the mortgage should stand as security for such further supplies. The amount was ascertained and reported by the referee. *id.*

Held, that, assuming the evidence satisfactory, parol evidence of such an extension of the mortgage was inadmissible. *id.*

4. The English and American authorities bearing upon the point examined. The doctrine of tacking, in its less technical sense, and as between the debtor and the creditor, not repugnant to justice.

The English cases of various classes:—

1st. Of bills to redeem, where the forfeiture being absolute at law, the court has refused its interference, except upon payment of the demands partly due. This was held in the early cases, but it is doubtful whether it is now the law.

2d. Cases of mere equitable mortgages, where the whole principle rests upon the intention resulting from an advance of money, and deposit of title-deeds. This peculiar equity appears to be un-

known in our state, probably from the operation of the registry acts.

3d. In another class, the question arises between the heir or devisee, and the mortgagor; then when there are legal assets, a bond creditor formerly, and a simple contract creditor of late, may unite his demands. The reason is, that the land has become subject to a lien in his favor. *id.*

5. In our state a mortgage for a definite sum may stand for the advances subsequently made up to the specific amount; but it cannot be held to secure that sum fully and be subsequently extended by a parol agreement to a further additional sum. *id.*

6. Although a judgment was recovered for the amount of extra supplies, in favor of the defendant in the action, *held*, that he could insist upon retaining the lien of the mortgage until it was paid, but was only entitled to the usual legal remedies of a judgment creditor. *id.*

7. The plaintiff purchased of the defendants the one-sixth of 66 bales of cotton, for which he paid them in full. The purchase was made in Boston, under an agreement that the cotton should be delivered at New York, and be there sold on account of all the owners, and be divided between them. When the cotton arrived in New York, the defendants, instead of making a sale or division, by mistake, and without the consent or knowledge of the plaintiff, sent it out of the state to a manufactory belonging to themselves in New Jersey.

Held, that the agreement did not constitute all who were interested in the cotton partners, so as to preclude the plaintiff from maintaining an action against the defendants alone for the eleven bales, or their value, to which he was entitled. The defendants, by not delivering the cotton in New York, according to their agreement, rendered themselves separately liable. *Ward v. Gaunt*, 257

8. Some time after the defendants had discovered their mistake in sending the cotton out of the state, they offered to bring back and deliver to the plaintiff the bales to which he was entitled.

Held, that, under the circumstances of the case, the plaintiff was not bound to accept the offer. 257

See *ANTE*, page 584.

ALIMONY.

1. The question, what amount of alimony ought to be allowed annually to the wife, if a decree of divorce be granted, is a question to be determined by the court, and is not to be submitted to the jury. In this respect, the Code of Procedure has not changed the former practice. *Forrest v. Forrest*, 102
2. Whether, with a view to aid the court in the ultimate consideration of that question, the court may, on the trial of the issues upon which the right to a divorce depends, direct them to find specially the amount and annual value of the defendant's estate? *Quere. id.*
3. But the admission of evidence of the value of the husband's estate, "for the purpose of submitting to the jury the question, what amount of alimony ought to be allowed?" and limited strictly to that special purpose, is no ground for setting aside the verdict upon the main issues upon which the right to a divorce depends. It could not bear in the least degree upon the question whether either or which of the parties had committed adultery, and could not have influenced the verdict upon that question. *id.*
4. And the direction of the court to the jury, if they should find a verdict for the wife, to find also specially what amount of alimony should be annually allowed to her, and their finding upon that question, furnish no ground for setting aside the verdict upon the question of the guilt or innocence of the parties of the adultery charged. *id.*
5. Although the question was for the court, and not for the jury, the defendant was in no possible manner prejudiced by the submission of that question to them: if their finding thereon be disregarded by the court, it was superfluous and harmless. *id.*
6. After a verdict in favor of the wife,

entitling her to a divorce, the husband is entitled to a hearing and an opportunity to produce proofs upon the question, What alimony should be allowed to her? 102

7. The court may require the husband to give security for the payment of the alimony awarded. The allowance of alimony may be made to commence from the time of the bringing of the action. It is erroneous to peremptorily require the wife to release her claim or inchoate right to dower in her husband's real estate. *id.*
8. Although a divorce *a vinculo matrimonii* be granted, yet if such divorce is founded on the guilt of the husband, the wife will be entitled to dower if she survive him. *id.*
9. And although the amount of alimony rests in the sound discretion of the court, the allowance ought not to be made on a condition that the wife release all claim and right to dower. *id.*
10. It seems that on settling the final decree, and settling the amount of alimony, it would be proper to give leave to apply to the court for any modification of the allowance which the changing circumstances of the parties—and especially the death of the husband, whereby the title to dower would become absolute—may render just. *id.*

ASSIGNMENT.

1. An assignment by a defendant, who prevails in an action of claim and delivery, of the judgment recovered by him, and all moneys to be obtained by means thereof, or by any proceedings to be had thereon, transfers to the assignee any undertaking executed in the action upon requisition made for the delivery of the property to plaintiff; and the assignees may maintain an action upon such undertaking. *Bowdoin, et al. v. Coleman, et al.* 182
2. Where, in an action upon an undertaking given on the part of plaintiff in an action of claim and delivery by an assignee of defendants, the undertaking is produced upon the trial, a delivery of it to the promisee pursuant to sec-

tion 423 of the Code may be presumed. 182

See ANTE, page 463.

ASSIGNOR AND ASSIGNEE

1. The plaintiff was an assignee, for value, of a certificate for twenty shares of the capital stock of the defendant's bank. The certificate was in the name of one Jenkins, and the shares stood in his name upon the books of the bank. The plaintiff demanded a transfer of the shares to himself, and a new certificate in his own name therefor. The president of the association refused to make the transfer, alleging that Jenkins's original subscription for the shares was unpaid, and the plaintiff brought this action to recover damages for such refusal. *McCready v. Rumsey*, 574
2. *Held*, that the plaintiff, as an assignee, had no other rights than would have belonged to Jenkins had he not parted with his certificate, and that by the true construction of section 19 in the general banking act, (1838,) and of the provisions of the bank's articles of association, he had no right to demand a transfer of the shares without paying to the bank the sum then due from Jenkins thereon. *id.*
3. *Held*, therefore, that the refusal of the president to make the transfer demanded was justifiable, and furnished no ground of action to the plaintiff for the recovery of damages. *id.*

See ANTE, page 76.

B.

BANKS.

1. On the 29th of June, 1854, the plaintiffs held a check for \$10,000, drawn by the Schuylers on the defendants, which the latter refused to pay, there being, at the time of the last refusal to pay, money deposited with them to the credit of the Schuylers, sufficient to pay the check. *Ketchum v. Stevens, President of Bank of Commerce*. 463

At that time the Schuylers owed the defendants \$25,000 and interest, evidenced by two stock notes, payable on demand, which notes, by their terms, pledged 370 shares of New York and New Haven Railroad stock for the payment thereof, with authority to sell the stocks, at public or private sale, without notice, on the Schuylers' failing to pay as they had promised. On the 1st of July, 1854, the defendants surrendered the certificates of stock to the railroad company and had a transfer of the shares made on the books of the company to themselves; and obtained a certificate of their being entitled to that amount of stock in the usual form. 463

On the day of, and after such transfer, the plaintiffs had two interviews with the defendants; inquiry was made of the latter why the check, which had again been presented for payment on that day, was not paid? The answer was, "because the bank had a loan demand on the drawers, which would absorb the whole amount of the credit of the firm." The question was put if the bank had not security, and the information was finally given that they held 370 shares of the stock, which, at 70, would cover the loan. At a subsequent interview, the inquiry was made by Mr. Bement, (one of the plaintiffs), "whether an assignment of the securities would be made and the check paid, upon discharging the loan?" The cashier and president of the bank replied that they could do nothing without the consent or order of the Schuylers. The terms of an arrangement being understood, subject to this condition, Bement obtained from the Schuylers this order:

"New York, July 1, 1854.

"Please deliver to Rogers, Ketchum & Bement, 370 shares of New Haven Railroad stock, upon their paying our notes for which said shares are pledged.

"R. & G. SCHUYLER.

"To Cashier Bank of Commerce."

This order was exhibited to the defendants by the plaintiffs, who at the same time paid them the \$25,000 and interest, and received from the defendants the certificate for the 370 shares of stock which had been so issued to the bank, with a power of attorney

authorizing its transfer, and their cashier's receipt that he had received payment of the Schuyler notes of Ketchum, Rogers & Beiment, and delivered them the securities, and the defendants then paid to the plaintiffs the check for \$10,000. On what arrangement the plaintiffs got such order from the Schuylers was not shown. The certificate did not represent genuine or actual stock, and was worthless. Of that fact the plaintiffs and defendants were alike ignorant, and the defendants acted in good faith throughout. On these facts, *held*,

1st. The plaintiffs paid, for the Schuylers, to the defendants, the amount which the Schuylers owed to the latter.

2d. Such payment was made pursuant to an arrangement between the plaintiffs and the Schuylers, as the principals and the sole contracting parties.

3d. The delivery to the plaintiffs, by the defendants, of the securities called stocks, was in consequence of and in obedience to the order of the Schuylers, and by authority of it, and was not in execution of any contract of the defendants to sell and deliver to the plaintiffs 370 shares of stock.

4th. The defendants were paid no more, as a condition of delivering the stock, than it was their right to demand, before they could have been compelled, by the Schuylers or any other person, to surrender it.

5th. If the plaintiffs paid this money for a consideration which has failed, or by reason of the suppression by the Schuylers of the information that the stock was false and spurious, their only remedy is against the Schuylers, on whose account it was paid. (Woodruff, J., dissented.) *id.*

2. A check, before acceptance, does not operate as an assignment of funds deposited by the drawer to his general credit with the drawee, nor create any lien thereon. When the drawees at the time the check is drawn and presented, hold a note made by the drawer, payable on demand, such note may be off-set against the claim of such drawer to recover the amount due for money so deposited, although actual payment of the note has not been demanded. No actual demand before suit brought is essential to the right to maintain an action on such a

note, and of course it can be set up, as a set-off, without a previous demand. Stock pledged as security for the payment of such a note, with power to sell the stock on default of the maker to perform his promise to pay, cannot rightfully be sold until after payment has been demanded; but such a note may be sued upon, or set-off, at a time when, by reason of no demand of payment having been made, the stock, pledged for its payment, could not be lawfully sold. 463

See *ANTE*, page 574.

BILLS OF EXCHANGE

A firm in Missouri drew two bills of exchange upon a firm in New York, one dated in St. Louis, Missouri, and the other in Ohio. The firm in New York accepted and paid the bills, not having any funds of the drawers in their hands. Barber, one of the members of the firm in Missouri, was sued in a tribunal of that state upon the bills, without joining his partners, the two other defendants, in this action. After pleading what is equivalent to the general issue, he gave a *repleta*, and thereupon judgment was rendered against him for the amount of the bills, interests, and costs.

Two statutes of Missouri were produced in evidence. By one of them it is provided "that all contracts, which by the common law are joint only, shall be construed to be joint and several; next, in all cases of joint obligations, or joint assumptions of co-partners, or others, suits may be brought and prosecuted against any one or more of those who are so liable." By the other statute it is enacted, "that every person who shall have a cause of action against several persons, and be entitled by law to only one satisfaction therefor, may bring suit thereon jointly, against all, or as many of the persons liable as he may think proper."

1. *Held*, that the effect of these statutes was to convert the joint liability of the partners, upon the bills, into a joint and separate liability, and that an action in Missouri would clearly be maintainable against the other partners, notwithstanding the judgment, had the

- contract been made there. *Suydam v. Barber*, 34
2. *Held*, that the fact of the contract being made in the state of New York, where a different rule prevails, would not have been sufficient to defeat such an action in Missouri. *id.*
3. But *held*, that as the contract was made in this state, the money was advanced here, the plaintiffs lived here, and the action was brought here, the law of New York, and not that of Missouri, must govern; and as the separate judgment merged the demand, the defendants other than Barber were discharged. *id.*
4. When one member of a firm makes a note in the firm's name, and puts it in circulation, and it is shown that it was made without the knowledge or consent of the other partner, and for a matter not relating to the partnership business, an indorsee cannot recover against the latter, without proof that he took it before maturity, in good faith, and for value. Evidence that such note, with others, was "passed to the plaintiffs for goods sold," and that "these notes were left with the plaintiffs as collateral security," is not sufficient to establish that the plaintiffs parted with the goods on the credit and security of the note. *McConnin v. Dearborn*, 309
5. The same is true as to a note made by one member of a firm, in the firm's name, after its dissolution, and lent to the payees, without the authority or consent of the other partner. *id.*
6. When a note thus made comes into the hands of an indorsee for value, it is a question of fact for the jury, whether such indorsee took it with notice of the dissolution of the firm. *id.*
7. The fact that an account which had been opened with a bank, in the firm's name, during its existence, was continued in such name to the date of the note, cannot be proved by parol without producing the books of the bank, or connecting the defendant not signing or assenting to the note with such subsequent transactions. The books themselves are the best evidence of the dates of the entries, and of the contents or terms of such entries. 309
8. The jury should dispose of all controverted questions of fact, and when a verdict is taken subject to the opinion of the court at General Term, it should be on questions of law only. And although liberty be reserved to the court to find the facts, it cannot at General Term undertake, with propriety, to do so, especially if it be found in favor of a party who has been permitted to give incompetent testimony against the objection and exception of the adverse party, and the finding must be founded, in part, on such evidence. *id.*
9. One Potter of Massachusetts, and Stebbins, the defendant, on the 15th of August, 1854, exchanged notes, each giving to the other his two notes, of the same date and amount, and having the same time to run. Potter, holding the two notes received from the defendant, on the security of them and of other notes, amounting in all to \$11,956.04, procured the plaintiffs on the 23d of August, 1854, to discount his note of that date for \$8,000, payable ten days thereafter. He failed to pay his \$8,000 note. He was proceeded against as an insolvent in Massachusetts, and on the 11th of October, 1854, Shaw & Swain were appointed trustees of his estate by a commission of insolvency, and he assigned his property to them as such trustees. When both of the said notes, so made by Stebbins, became due, and separate suits had been brought thereon, only \$3,614.67 of the other collaterals had become due, and they had been paid. When the said two actions were tried, and they were tried together, all of the other collaterals had matured and produced enough to pay the note which the plaintiffs discounted for Potter, into the sum of \$196.11, including interest. *Nantucket Pacific Bank v. Stebbins*, 341
- Held*, that the plaintiffs were entitled to judgment in the actions on the notes made by Stebbins for the amount of the notes, with interest and the costs of the actions; that each note was a good consideration for the one exchanged for it; that at the time Potter conveyed his estate to Shaw & Swain, as trustees in the insolvency proceedings, the defendant could not have

compelled the notes made by him to be set off against those he received in exchange therefor; that any equities which Stebbins might have, could only be considered and determined in an action or proceeding, to which Potter, Shaw, and Swain were parties. 841

10. That an order or provision in the judgments, permitting him to be discharged therefrom on paying to the plaintiffs the balance due to them from Potter on the \$8000 note, and the costs of the two actions, and the residue of the moneys into court, to abide its further decision, on application for such moneys to be made either by Shaw & Swain, or by the defendant, on due personal notice to the other of the time and place of such application, secured to the defendant all the relief to which he was entitled in such actions on such a state of facts. *id.*

11. No action can be maintained against the indorser of a promissory note by indorsees in whose hands it was placed for a special purpose, when it appears that to their knowledge the purpose for which it was delivered to them had wholly failed, and that it was their duty to have returned the note to the party from whom they had received it. *Prall v. Hinchman*, 351

12. The objection in such a case to a recovery is equally fatal, whether the suit is brought in the names of the indorsees or in that of a nominal plaintiff for their benefit.

Held, that as it clearly appeared from the evidence in this case, that the plaintiff had paid no value for the note, had not retained its possession, and had not directed the suit to be commenced, he could not be regarded as a *bona fide* holder, and not being the real party in interest, had no right, under the Code, to maintain the action. *id.*

13. When the indorser of a note resides in the place where it must be presented, and payment of it demanded, notice to the indorser, as the general rule, must be served on him personally, or by leaving it at his residence or place of business. The only exceptions are that when the indorser lives

in the same city or town in which presentment and demand must be made, but at some point remote from the place of presentment, between which there is a communication by mail, the notice may be served by mailing it to him, directed to him at a post-office where he usually receives his letters and papers. *Eddy v. Jump*, 492

14. When two persons exchange notes, each taking the note of the other, of the same date and amount, and payable at the same time, each note is the proper debt of the maker thereof, and each of such persons is a purchaser for value of the note he received from the other in exchange for his own. *Coburn v. Baker*, 532

15. Hence, if Willett (one of the two) transfers the note he so received to another, as collateral security for the payment of a mortgage on premises which Willett had bought subject to such mortgage, and on an agreement to pay such mortgage as a part of the contract price; and if Coburn (the other of the two) and the maker of the note so transferred, pay it, Coburn cannot maintain an action against Baker and wife, by reason of the same premises having been conveyed to Baker's wife before the note made by Coburn became due or was paid, subject to the same mortgage, and on her agreement to pay such mortgage as a part of the purchase money, to obtain a judgment compelling Baker and wife to refund to him the amount of such note, or that, in default thereof, the mortgaged premises be sold, and the proceeds of such sale be applied to reimburse to him the amount of such note, although Willett has failed to pay the note he gave to Coburn, and has become insolvent, and a receiver of his property has been appointed on proceedings supplementary to execution. *id.*

16. Such a receiver, he having been appointed before the notes so exchanged were due, "could have enforced payment of the note made by Coburn, had it then belonged to, and been held by Willett, and the proceeds would, of right, be payable to the judgment creditors, at whose suit such receiver was appointed. *id.*

17. Prior and up to the 23d of September, 1850, the firm of Evans, Davis & Lownd owed plaintiff \$14,069.38, for moneys advanced to it, and for which he held their notes. That firm dissolved that day, and Evans and Davis formed a new firm with Dodge, under the name of Davis, Evans & Dodge. Plaintiff gave up the notes of the old firm, and took two new notes of \$7500 each, dated September 23, 1850, payable "on demand after date," one of which was signed by Evans, and the other by Davis, of the firm of Evans, Davis & Lownd. *Brown v. Davis*, 549

Plaintiff signed the partnership agreement of Davis, Evans and Dodge; that stated, that the amount of \$15,000 due to the plaintiff from the old firm "is to remain in the new concern during the continuance of the copartnership," he receiving interest at the rate of seven per cent. per annum. Under same date, Davis, Evans and Dodge and the plaintiff signed a paper stating they had received from plaintiff \$15,000, "being the amount contributed by him as special partner to the concern of Davis, Evans and Dodge." Davis, Evans, and plaintiff signed another paper of the same date, stating that they had formed a limited partnership under the name of Davis, Evans and Dodge, the nature of its business, the residence of the partners, that plaintiff is the special partner, and as such has contributed \$15,000 in cash, and that Davis, Evans and Dodge were the general partners. Enough was not done to create a limited partnership. The new firm failed, and was dissolved within a year, and before this suit was brought, owing some \$30,000 more than it could pay. This suit is brought on the note for \$7500 given by Davis to plaintiff when the new firm was formed. On that note, and also on the other note for a like sum, given by Evans, there is indorsed: "This note is given as security to Levi Brown, (the plaintiff,) for one-half of the \$15,000 advanced to Davis, Evans and Dodge. ROBERT DAVIS." *id.*

18. *Held*, 1st. The plaintiff never discharged Davis and Evans from liability

for the amount the firm of Davis, Evans and Lownd owed him, but took the note of each for half of that sum.

2d. Though that sum was continued, in the assets which represented it, as a loan to the firm of Davis, Evans and Dodge, it was not placed, as between themselves, at the risk of its business, nor lent on an agreement to look solely to the new firm for payment.

3d. The note in suit became due, on demand of payment, made after the new firm had actually dissolved, and plaintiff could sue on the note without having first sued and exhausted his remedies by action against the new firm.

4th. The evidence given is insufficient to establish an intent of Davis, Evans and Dodge, and of the plaintiff, by the arrangement in respect to a limited partnership, to defraud the public, or that they knew their acts were invalid, or that they were done with an improper motive.

5th. The plaintiff is entitled to a judgment on the verdict. Permitting such a recovery will not withdraw from the legal or equitable process of the courts any property which should be appropriated to the creditors of the new firm, though held to be composed of Davis, Evans and Dodge, and the plaintiff, as general partners. A judgment by such creditors against the four, and appropriate ulterior proceedings, will reach all the individual property of each, as well as all the effects of the new firm. 549

19. The law presumes that the acceptor of a bill of exchange has funds of the drawer in his hands, and in an action against the acceptor, the burden of disproving the presumption rests upon him. When the presumption is not repelled, the drawer of the bill stands in the same relation to the acceptor as the indorser of a promissory note to the maker. The acceptor is the principal debtor, the drawer his surety merely. *The Atlantic Fire Ins. Co. v. Boies*, 583

20. In such a case, the extension to the drawer of the time of payment does not operate to discharge the acceptor. *id.*

21. The question whether a negotiable

or other security was received by the holder of the bill as a payment, or merely as a collateral, when there is a conflict of evidence, is for the determination of the jury, and their verdict, when it cannot be set aside as contrary to evidence, is conclusive. When a promissory note, received by the holder of the bill as a collateral security, is not that of a third party, but of one already liable on the bill, it cannot be treated as a pledge, and hence the rules of law relative to the disposition of a pledge are not applicable. 583

22. In a complaint upon a written instrument, by which the defendant promised to pay to the plaintiff, "as executive agent of the company, Bureau, Guillon, Godin & Co., the sum of \$5000, for which I am to receive stock of said company, known as premium stock, (*actions a prime*.) to the amount of \$5000, value received," it is necessary to allege that the stock was delivered, or an offer to deliver it, on the day on which the \$5000 was payable, or it will be bad on demurrer. 686

23. Such an instrument is not a negotiable promissory note, and cannot be declared on as such. *Considerant v. Brisbane*, *id.*

See ANTE, pages 34, 437, 463 and 514.

BILL OF LADING.

See ANTE, page 194.

C.

CHECKS.

1. Although the date of a bank check is not material to its validity, it determines the time of its payment. Hence, the payment, by a bank, of a post-dated check before the day upon which it is dated, is a payment in its own wrong, and the money so paid remains to the credit of the drawer. 76

2. The assignee, in good faith, of this

fund, may maintain an action against the bank for its recovery. 76

3. A Judge is not bound to submit a question of fact to the jury, when their verdict, if contrary to his views of the testimony and its legal effect, would be certainly set aside, as against law and evidence. *Godin v. The Bank of the Commonwealth*, *id.*

4. When the drawer of a check stops its payment at the bank on which it is drawn, he cannot object to a recovery of its amount by the holder, on the ground that notice of non-payment was not given to him. *Purchase v. Mattison*, 587

5. Where in such a case the plaintiff averred in his complaint that actual notice of non-payment was given, and the defendant, in his answer, averred that the defendant had stopped payment of the checks, and proof thereof was given on the trial without objection, the court will not entertain the objection that the plaintiff, instead of averring in his complaint notice of non-payment, should have set forth the facts excusing such notice. *id.*

6. Under such circumstances, the case is at most one of mere variance between the complaint and the proof, and as the answer itself shows that the defendants could not have been misled, the variance must be disregarded. *id.*

7. When the plaintiff, in the complaint, avers facts amounting to an excuse for not giving notice of non-payment, and proves such facts on the trial, he is entitled to recover, although he has also averred notice and gives no proof thereof. This latter averment may, and ought to be regarded as surplusage. *id.*

8. The rejection of evidence, which, although in its nature competent to establish the fact proposed to be proved, if wholly irrelevant to the issues made by the pleadings, is not a ground of exception. *id.*

9. Where a plaintiff shows a sufficient legal title in himself to the cause of action in controversy, the non-joinder of a third person as plaintiff who has

an interest in the recovery, is waived when not set up by answer or demurrer. 587

10. When a witness is cross-examined as to matters collateral to the issues, the cross-examining party is bound by his answers, and is not allowed to contradict in order to discredit him. *id.*

11. Negotiable paper lent or advanced by the maker for the accommodation of the borrower, but without restriction as to its use, is good in the hands of a transferee, though received in payment of a pre-existing debt. *id.*

12. A check, payable on demand, advanced to a third person, in consideration of his agreement to do or perform some act beneficial to the maker at a future day, is not an accommodation check, nor without consideration, and it may be collected by the transferee without proof on his part that he paid value therefor, and without proof that such agreement was performed. *id.*

See *ANTE*, page 463.

COMMON CARRIERS.

1. The undertaking and duty of a common carrier are not only to carry and deliver safely the goods intrusted to him, but also to carry and deliver them within a reasonable time, but the first duty is absolute, the second merely relative. 375

2. What is a reasonable time depends, in each case, when the question arises, upon its particular circumstances, and is usually, if not always, a question of fact for the determination of a jury. *id.*

3. When it appears that a delay beyond the ordinary time was not occasioned by any negligence, fault, or want of skill of the carrier, but was imputable solely to the recklessness of a third party, the law regards it as an inevitable accident, for the consequences of which the carrier is not responsible. *id.*

4. The Judge, upon the trial, charged the jury that the defendants were responsible for the damages caused by a

delay in the delivery of cattle belonging to the plaintiffs, even if a collision, which produced the delay, was imputable solely to another railroad company; and he refused to charge, as requested by the defendants' counsel, that if the collision was caused by the carelessness of the other company, without any negligence or fault whatever on the part of the defendants, they were not responsible for any damages sustained by the plaintiffs. 375

5. *Held*, that the Judge erred in his charge, and that he ought to have submitted to the jury the question whether the collision was not solely caused by the negligence of the Hudson and Berkshire Railroad Company, as evidence had been given tending to show that such was the fact. *id.*

6. It seems that the defendants, if liable at all, were not so for the shrinkage of the plaintiff's cattle; their disposition to become restive, and their trampling upon each other, as injuries from these causes, must be deemed to have arisen from the nature and inherent character of the property carried.

7. It seems, also, that damages resulting from the loss of a market, occasioned by a delay not excused, as too speculative and contingent, are not recoverable. *Conger v. Hudson River R. R. Co.* *id.*

8. The complaint states, as a cause of action, that the plaintiff, while a passenger in the cars of the Harlem Company, was injured by such negligent management by each company of its train of cars, that the two trains came in collision, and that by such collision the injury was inflicted. Each company answered separately, denying negligence on its part.

The jury found that the collision which caused the injury was produced by the concurring negligence of the two companies. 382

9. *Held*, if the cause of action against each company is, on the facts stated, several and not joint, the misjoinder is cured by answering and by omitting to demur, and neither had a right to a separate trial; such defect appearing on the face of the complaint. *Cole-*

grove v. Harlem and New Haven Railroad Companies, 882

10. The plaintiff was injured by the collision; a single and forcible act, caused directly by the joint action of the two, and without such concurring action or common negligence, there might have been no collision and no injury. For an injury thus caused, trespass would lie. All who concur in a forcible and wrongful act, which directly injures, may be sued jointly. Neither defendant, though separately sued, would be exonerated from any part of the damages resulting from an injury thus caused. *id.*
11. The negligence of the Harlem Company cannot be imputed to the plaintiff, in such sense, as to exempt the New Haven Company from liability to him. The Harlem car was not the carriage of the plaintiff, nor one subject to his control, or under the management of his servants. *id.*
12. Although a defendant moves for a nonsuit at the close of the plaintiff's evidence, and on such evidence alone, is entitled to it, and excepts to a decision denying the motion, yet, if instead of standing on the exception, he gives evidence, and a verdict ultimately passes against him, on sufficient evidence and a proper charge, his exception will not entitle him to a new trial. It is waived by giving evidence to the merits sufficient to establish his liability. *id.*
13. The same is true of an exception to a decision overruling an offer of the defendant to demur to the plaintiff's evidence. *id.*
14. The fact that the plaintiff stood on the platform of the Harlem car at the time of the collision, is no answer to his action against that company, no notice being at the time posted up as required by section 46 of the Laws of 1850, p. 234. He owed no duty to the New Haven Company, which made it negligent in him, as between himself and that company to be there, in view of the possibility of coming in collision with one of the trains of that company, which, according to its regulations, had no right to be on the track on that day, and which there was not the slightest reason to suppose might be on it. 882
15. If a passenger in one of two trains, owned and run by different companies, is injured by their coming in collision, and such collision would not have occurred if both companies had exercised that ordinary care which they owed to all persons travelling on the road, and if the plaintiff, as between himself and both companies, was lawfully where he was, and if he was guilty of no negligence in not anticipating such a collision, and in not seeking a seat with a view to its possible occurrence, the fact that he was on the platform of a car, when injured by such a collision, is no bar to his right of action against either company. *id.*
16. On such a state of facts, and when no negligence can be imputed to the plaintiff, except the mere act of riding upon the platform, it is not erroneous, or calculated to mislead a jury, to instruct them that the general rule is, that the negligence of a plaintiff which goes to excuse the defendants' negligence, must be such negligence as contributed to the accident which caused the injury. *id.*
17. Woodruff, J., dissenting, *held*, that on the facts of this case, an action would not lie against the defendants jointly. The collision is not the cause of action and ground of liability, but the negligence which caused it. Each defendant is liable for the fault of its own servants, and for that only. The companies were acting wholly independently of each other, and were not discharging any common obligation to the plaintiff, and violated no duty which they owed him in common. The *culpa causans* is separate, in respect to each defendant, and whether injury results concurrently, or otherwise, cannot change their relation to each other, or to the plaintiff. *id.*
18. The liability of either defendant is not founded in any act of such defendant, but in negligence only, and such negligence in no wise tended to produce negligence in the other. A joint verdict against the defendants, on the facts of this case, should not be sustained. *id.*

19. The Judge erred, in charging that the general rule is, that the negligence of a plaintiff, that goes to excuse the defendants, must be such negligence as contributed to the accident that caused the injury. Cases specified, in which such a statement of the rule of law would be erroneous. The true inquiry is, whether the plaintiff's injury is attributable, in part, to his own carelessness; whether his negligence contributed to his hurt? 382
20. The charge in this respect was erroneous and prejudicial to both defendants, and particularly so to the New Haven Company. A verdict and judgment against the defendants jointly are not proper in this action, and the verdict should be set aside, and a new trial ordered. *id.*
21. When a railroad company gives such published notice of the running of its trains, and such special notice in the cars of the necessity of changing cars, at any particular station, that every traveller of ordinary intelligence, by the use of reasonable care and caution, would obtain all requisite information as to the route to be travelled, and the cars to be taken at such intermediate point of the voyage, it discharges its whole duty in this respect. *Page v. New York Central Railroad Co.*, 523
22. If a passenger, merely by a failure of his own to use such care and caution, instead of changing cars at a particular station, and there taking cars which go to the place to which he has paid his fare, continues in the cars in which he started, and is carried in another direction, the result is to be attributed to his own negligence, and not to a breach of duty or of contract on the part of the company. *id.*
23. If by inadvertence he is started from a station at which he should have changed cars, in a wrong direction, and this is discovered in time to enable him to return to such station, so that he may go thence for the place to which he had bought a ticket, without any delay, and if he is permitted to return without charge, but refuses to do so, or to pay his fare for the route he is actually travelling, or to leave the cars, he may lawfully be ejected therefrom. If ejected, his own declarations made some days thereafter, that he was injured thereby, are not competent evidence in his own favor to prove the fact of such injury. 523
24. Although, as a general rule, "ordinary prudence" is all that can be exacted from a railroad company in respect to passengers on the same road, yet the rule is not to be understood as meaning that only the same degree of care is to be required in all cases. *Johnson, Ex. v. Hudson River Railroad Co.*, 633
25. The only safe interpretation of the rule is, that the company is bound to use a degree of care and vigilance, to prevent accidents and injury to others, which is proportioned to the dangerous character of its business, and of the mode and means of conducting it. *id.*
26. The true rule may, therefore, be stated in these words: The degree of vigilance which the law exacts in its requirement of ordinary care, varies with the probable consequences of negligence, and also with the command of means to avoid injuring others possessed by the person on whom the obligation is imposed. *id.*
27. Held, that applying this rule to the facts in evidence before him, the Judge, upon the trial, properly instructed the jury that, considering the nature of the business in which the defendants were engaged, and the hazards attending the running of cars in the streets of the city, particularly on a dark night, they were bound to use the utmost care and diligence, and for the purpose of avoiding accidents endangering life, were bound to use all the means and measures of precaution that the highest prudence would suggest, and which it was in their power to employ, and that if the use of bells and lights upon the cars was a measure by which disastrous accidents would probably be avoided, the omission to use them, if proved to the satisfaction of the jury, was culpable negligence, and it was for the jury to say whether to this negligence the fatal accident which had given rise to the action might not justly be imputed. *id.*

28. *Held*, therefore, that applying to the defendants the true rule of ordinary care, the Judge, under the circumstances detailed in the case, could not have required from them a less degree of diligence and prudence than that which he laid down as the measure of their obligation. 633

The defendants' counsel insisted that the Judge erred in leaving the jury to determine whether the defendants should have carried lights or bells instead of determining, as a question of law, whether such use of lights or bells was exacted from the defendants in the exercise of ordinary care. *id.*

29. *Held*, that there was no error on the part of the Judge, that he did determine the question of law, namely, that the prudence exacted of the defendants was that which, in view of the hazardous character of their business, would tend to diminish the danger of accidents, and that he properly left to the jury, as a question of fact, whether the use of lights or bells was a measure of that character. *id.*

The Judge charged the jury, that the deceased person, whose death was attributed to the negligence of the defendants, was bound to exercise only ordinary care; and he defined that care as the care and foresight which men of ordinary prudence are accustomed to employ, and which, placed in like circumstances, they probably would have employed. *id.*

30. *Held*, that there was no error in this instruction to the jury. *id.*

31. *Held*, that the Judge properly refused to charge the jury, that the manner in which the deceased was found on the track of the railway, without any explanation as to how he got there, was presumptive evidence of negligence on his part. *id.*

32. It appeared on the trial that the deceased was a young man, between the ages of thirty and forty, and in good health, and the Judge charged the jury, that the probable continuance of his life was at least twenty years. *id.*

33. *Held*, that the expectation of life is a known scientific fact, to which a Judge, upon trial of a cause, has the same

right to advert as to a known historical fact, and as the expectation of life between the ages of thirty and forty is known to exceed thirty years, there was no error in the charge of the Judge.

Woodruff, J., dissented from the opinion and its conclusions. 633

CONSIDERATION.

See *ANTE*, page 532.

CONSTABLE

See *ANTE*, page 698.

CONTRACTS

See *AGREEMENTS*.

CORPORATION.

See *ANTE*, pages 225 & 680 (*La Farge*, v.)

COUNTER-CLAIM

See *ANTE*, pages 53, 629, and *PLEADING*.

D.

DAMAGES.

See *ANTE*, pages 220, 315, 363, 375 and 671.

DEATH.

See *ANTE*, page 282.

DEMURRER.

See *ANTE*, page 282.

DEMURRER TO EVIDENCE

See *ANTE*, page 382.

DIVORCE.

See *ALMONY*.

DOWER, TENANT IN.

See *ANTE*, page 629.

E.

EASEMENT.

See *PARTY-WALLS*.

ESTOPPEL.

See *ANTE*, pages 363, 564.

EVIDENCE.

1. A copy of a paper filed with the clerk of the House of Representatives at Harrisburg, Pennsylvania, on the 21st of February, 1850, purporting to be a petition of the defendant to be divorced from the plaintiff, was allowed to be read without proof of the genuineness of the signature of the defendant to the paper so filed, the only objection made to its admissibility being that "the absence of the original was not sufficiently accounted for." The paper so read had been served on the plaintiff by the defendant's direction, with a notice that the original would be presented to the legislature of Pennsylvania, at Harrisburg, on the 21st of February, 1850. The paper or petition purported to have been sworn to by the defendant, on the 16th of February, and such notice was dated the 19th of February: with the paper so filed at Harrisburg was an affidavit of the service of a copy thereof, and of such notice on the plaintiff on the 21st of February, 1850. It was proved that the original was given to the defendant to be carried to Harrisburg, where the legislature was in session at the time, and that notice had been given to him to produce it, and that proper search had been made in the proper places for the original, whether in the custody of the Senate or of the House of

Representatives, and that no other petition could be found than the one, of which the paper read was a copy. *Held*, that the paper was properly admitted as evidence of the contents of a petition or paper signed by the defendant.

2. When a paper is offered in evidence by a party, and excluded by the court, and such party excepts, the decision, although erroneous, will not entitle him to a new trial, if at a subsequent stage of the trial it is again offered by the same party, and admitted and read in evidence, before any witness has been further examined before the jury.
3. Neither party has a right to read, on the trial of an action, an affidavit made by himself, as evidence in his own favor, of the truth of the statements it contains: the fact that it was opposed, in the action in which it was made, by the affidavit of the other party, does not make it admissible in his own favor in another action to maintain the issues being tried in the latter; either has a right to read an affidavit made or paper signed by the other, if it contains matter pertinent to the issues. If a defendant reads, on the trial of a cause, part of an affidavit made by the plaintiff in another action, the plaintiff has a right to read all other parts of it which are relevant. In such a case, the plaintiff has a right to read not only such other parts as tend to explain, modify, or destroy the effect of the part read by the defendant, but also those parts of it which are pertinent to the general merits of the action and the issues to be tried, although having no connection with the particular matter or subject to which the part read by the defendant relates.
4. When the affidavit from which a defendant so reads, refers to, and identifies other affidavits made by the plaintiff, and re-affirms the truth of their statements in all respects, the plaintiff may also read from such other affidavits all parts thereof, which are relevant and material to the issues which the parties are trying.
5. On the trial of an action in this state, parol evidence of the contents of a

- paper in another state may be given, when it is shown to be in the possession of a party in such other state, and who, on being examined upon commission, peremptorily refuses to produce it, it not appearing that by the laws of such state he can be compelled to surrender the possession of it to be used in the courts of this state. *Forrest v. Forrest*, 102
6. When, in an action to recover damages for the unlawful conversion of personal property, the issue made by the pleadings is, whether the plaintiff, at the time of the alleged conversion, was the owner of the property, and as such entitled to its immediate possession, it is competent to the defendant to show that the legal title was at that time vested in a third person, and that the plaintiff was not in the possession. *Davis v. Hoppock*, 254
7. Upon the trial of an action to recover the damages alleged to have been sustained by the plaintiff from certain wrongful acts of the defendant, although no express agreement or consent of the parties to the commission of the acts be proved, the jury has the right to infer the existence of such an agreement or consent from the acts of the parties and other circumstances. *Waller v. Post*, 363
8. So where it is proved to the satisfaction of the jury that the plaintiff actually consented to the acts for which, as trespasses, he claims damages, he ought not to be allowed to recover. *id.*
9. And a consent operates as a license, and a licensee is, in all cases, a justification of a trespass. *id.*
10. As a license is not required to be in writing, it may, in all cases, be proved by parol, either by showing its express words, or by proof of facts and circumstances from which the jury may infer its existence. *id.*
Held, therefore, that the Judge erred, upon the trial of this cause, in refusing to instruct the jury as requested, "that it was not necessary for the defendant to prove an express consent of the plaintiff for him (the defendant) to take down and remove the old division-wall, but that his consent might be inferred from his acts, and that if the jury believed that he did consent to these acts of the defendant, he cannot recover any damages therefor," and that the Judge also erred in charging the jury that, "unless the defendant had proved a clear and express consent on the part of the plaintiff that the defendant might remove the wall, he was not precluded from recovering any damages resulting to him therefrom." 363
11. *Held*, also, that the further instruction given by the Judge to the jury, "that if the plaintiff merely submitted to the taking down of the wall from an erroneous opinion that the defendant had a right to remove it, his submission would be no bar to the action," if not clearly erroneous, was calculated to mislead the jury. *id.*
12. There are many cases in which such a submission to the acts of a person who is acting not wilfully, but is doing what he believes he has a right to do, would be justly construed as an acquiescence that would preclude the plaintiff from asserting his own ignorance of his legal rights to the prejudice of a defendant equally ignorant, and relying in good faith upon the silent submission of the plaintiff as sanctioning his acts. *id.*
13. In such cases it may be justly held, that the submission of the plaintiff operates as a license, the validity of which he is estopped from denying. *id.*
14. In an action to recover damages for the injuries to the business of the plaintiff from a wrongful act of the defendant, the loss of profits, if a direct consequence of the wrong, may be included in an estimate of the damages that the plaintiff is entitled to recover. *id.*
15. In an action against the indorser of a promissory note his denial, in a verified answer, of a demand and refusal of payment, protest and notice, is not an affidavit within the meaning of the statute, so as to exclude the certificate of a notary from being read in evidence. *Young v. Catlett, Ex.*, 437
16. Where a witness under examination in chief, suggests no want of recol-

tion, and expresses no desire to refresh his memory, nor manifests by his answers any want of ability to answer readily and fully all relevant questions that may be put to him, the examining counsel cannot be allowed to place in his hands any paper or memorandum relative to facts concerning which he has been called to testify. 437

17. To permit the examining counsel to place such a paper in the hands of the witness under the circumstance stated, and in anticipation of questions that he means to put, is to suggest to the witness the answers that are desired, and is open to the strongest objections that can be urged against the allowance of leading questions. *id.*

18. The certificate of a notary, stating that he had demanded payment of a promissory note of an assignee of the makers, who were insolvent, "at his and their place of business," and that the assignee refused such payment, is sufficient, although it omits to state that the makers were not present when such demand was made. *id.*

19. An entry made by a public officer, in the discharge of his official duty, in a book which he is bound to keep as a record of his proceedings, is admissible in evidence to prove his performance of the acts to which it relates. *Bissell v. Hamblin*, 512

20. The evidence is admissible even when the officer is a party to the action, and it is on his own behalf that the proof is offered. *id.*

21. It is still a presumption of law that the entry was made by him in the proper discharge of his duty, and if mistake or fraud is alleged, the proof lies upon the opposite party. *id.*

See *BILLS OF EXCHANGE*, 7, and *ANTE*, pages 56, 71, 254, 315, 328, 437, 523, 539, 564, and 587.

F.

FIRE INSURANCE

Goods were insured in a store, No. 21 Avenue D, and during the running of D.—VI 46

the policy were removed to another store, known as No. 871 Grand-street. This removal took place on the 1st of February, and notice thereof was given to the company on the 1st of March.

By one of the clauses of the policy it was provided as follows: "This insurance (the risk not being changed) may be continued for such further time as shall be agreed upon, provided the premium thereof is paid, and indorsed on this policy, or a receipt given for the same."

By the charter of the company it was provided, "that the president, or other person appointed by the board of directors for that purpose, shall be authorized, in the name and in behalf of the company, to make contracts of insurance with any person or persons against loss or damage upon any property on which this company may lawfully make insurance. The policies issued pursuant to such contract of insurance shall be signed by the president, and countersigned by the secretary of the company; or the same may be signed and countersigned by such other person or persons as a majority of the directors may appoint for that purpose. Such policies shall be binding and obligatory upon the company in like manner and force as if made under the seal of the company."

A loss by fire occurred on the 1st of July, 1854.

Much testimony was taken as to the acts and declarations of officers of the company, tending to show acquiescence in the change of the risks, on which the jury were instructed to pass.

On exceptions to the charge of the Judge, *held*,

1. That, under the charter and general act, no insurance could be binding unless it was in writing, nor unless it was signed by the president and secretary, or other persons designated by the directors. *Spitzer v. The St. Mark's Insurance Co.*, 6

2. *Held*, that the effect of the removal of the goods was to put an end entirely to the policy. It did not cover the goods afterwards, but was as void and inoperative as if never made. *id.*

3. *Held*, therefore, that to revive the policy was the same as to make one, and could only be done by a written

instrument, executed in the same manner as an original instrument must be.

6

A lot of cloth was delivered to the plaintiffs by the defendant to be manufactured into clothing. While in their possession it was destroyed by fire. The plaintiffs were insured to the amount of \$27,500. Their own stock exceeded that amount considerably, and they recovered the sum of \$27,000 on the policies. The goods of the defendant destroyed were of the value of \$885. The policies contained the following clause:—"The ——— Insurance Company doth hereby insure Stilwell and Montross against loss or damage by fire to the amount of \$——, on their stock of ready-made clothing, and other hazardous merchandise, the property of the insured, or held by them in trust or on commission, or sold but not delivered, contained in the building No. 112 Fulton-street, in the city of New York." The action was to recover the amount due for making and trimming the cloth. *Stilwell v. Staples*,

63

By another clause, the property held in "trust or on commission, must be insured as such, otherwise the policy will not cover such property." *id.*

4. *Held*, that the goods of the defendant were goods held in trust by the plaintiffs for his use; that they were covered by the policy; that the phrase embraced and designated goods, the possession and custody of which was in the party effecting the insurance, and the actual ownership in the party (the defendant here) who had delivered them, and that the defendant was entitled to off-set his proportion of the insurance money against the plaintiffs' demand for manufacturing the cloth. *id.*

5. The words in the policy were sufficient to cover the defendant's goods; it was a just presumption that they were used to protect goods so situated; and hence the burden was on the plaintiffs, the factors, to show that they employed them in a restricted sense, as goods for which orders to insure had been received. *id.*

FORMER SUIT.

See *ANTE*, pages 34 and 687, (*Hecker v.*) and 697, (*Fuller v.*)

FRAUDS, STATUTE OF.

See *ANTE*, page 662.

FREIGHT.

Action upon a policy on freight. The cargo was salt in sacks, and a large portion of the contents was washed out by an accident attributable to the perils of the sea. The sacks were delivered, some entirely, and others partially empty.

Held, that upon the principles of *Nelson v. Stephenson*, (May Term, 1856,) the freight was lost to the ship-owners; that it was nearly an universal rule, that when freight could not be recovered from the shippers, it could be from the underwriters, in a policy.

The salt and sugar were to be deemed soluble articles within the case referred to. *De Wolf v. State Mutual Fire and Marine Ins. Co.*, 191

See *ANTE*, page 194, and *MARINE INSURANCE*, 8, 9.

G.

GUARANTY.

1. Where the collection of a promissory note is guaranteed, the person to whom it is delivered, if the note is unpaid at its maturity, is bound to proceed with prompt diligence to enforce its payment. This is a duty which he owes to the guarantor.

2. If he neglect or violate this duty, he takes upon himself the risk of the collection of the note, and discharges the guarantor.

3. He violates this duty if, after commencing a suit against the maker of the note, he discontinues it, and takes from him a new note, or other security

for its amount, payable on a future day, without the consent or knowledge of the guarantor.

4. If, in such a case, by an agreement between the parties a portion of the original note, when collected, is to be paid over to the guarantor, the latter has an immediate right of action for the recovery of this balance, in the same manner as if it had been in fact collected.

5. A surety on a promissory note, whether as a guarantor or an indorser, is, in all cases, discharged where, without his consent or knowledge, a new note, payable on a future day, is taken from the maker.

6. Although the taking of such a note may operate, as between the parties, only as a conditional satisfaction, yet, in all cases, it suspends until maturity the right of collecting the original note, and is, therefore, in all cases, an unwarranted extension of credit, discharging a surety.

7. Where the promise of a defendant is stated in the complaint as absolute, but is proved, upon the trial, to have been conditional; if it is also shown that, before the commencement of the action, the condition was fulfilled, the variance, under a reasonable construction of sections 169 and 171 of the Code, may be disregarded.

8. At any rate, when the evidence showing the variance has been received upon the trial, without objection, the referee ought to disregard it, leaving to the court, in the exercise of the discretion given by § 173 of the Code, to amend the complaint, by conforming its allegations to the proof. *Hurt v. Hudson*, 294

9. George R. Hasewell entered into a written contract with the plaintiff, and the defendant signed a guaranty written thereon. The contract and guaranty read thus:—

“Penna. Zinc.

“350 shares, 3 $\frac{1}{4}$ B 60.

“New York, April 3d, 1854.

“I have purchased of Theo. S. Draper three hundred and fifty shares of the

stock of the Penna. and Leigh Zinc Co., at three and three-eighths dolla. per share, payable and deliverable, buyer's option, in sixty days, with interest at the rate of six per cent. per annum.

“GEO. R. HASEWELL.”

“I guarantee the within contract.

“GEO. M. SNOW.”

Draper v. Snow,

662

10. *Held*, that neither the written words of the guaranty, nor that and the contract of Hasewell when considered together, expressed any consideration for the guarantee; and that, therefore, the latter being an agreement for the default of another was void. That an averment of extrinsic facts, which, if expressed in the instrument, or fairly imported by it, might constitute a consideration, did not obviate the difficulty. *id.*

11. To satisfy the statute of frauds, a guaranty by one person of the performance by another of his contract, must, in terms or by fair construction, disclose the actual consideration of the guaranty, or, at all events, a consideration sufficient to make a contract obligatory at law. When it does not disclose any consideration, the guaranty, as a contract, is absolutely void. *id.*

I.

INCORPORATION.

Under the act of April 12, 1852, for the incorporation of ocean steam companies, it is not a pre-requisite that the payment of the ten per cent. should be stated in the certificate which is to be filed. It is a matter to be proven, when necessary, as a fact.

It was found, as a fact in the case, that the ten per cent. had not been paid in, upon the incorporation of The Mexican Ocean Mail and Inland Company. It was also found that the seventh section, directing a certificate to be filed within thirty days after the last installment had been paid, had not been complied with.

Upon the testimony in the cause, it was concluded that the defendant had avowed himself to be a stockholder

in the company above named, had registered himself as such upon the books, and had taken part in the management.

1. *Held*, that it was not competent for him to allege against a creditor, that the company had never been legally constituted, by reason of the omissions or default above noticed.

A debt was incurred by such company to the plaintiffs, during the period that the defendant was a stockholder. A judgment against the company was obtained, and execution returned unsatisfied.

2. *Held*, that the defendant was liable for the demand, and that his liability was not restricted to the amount unpaid upon his stock, but was, under the 6th section of the act, for the whole amount of the stock held by him, for all debts contracted until the certificate has been filed. *Eaton, et al v. Aspinwall*, 176

INDORSER.

See *ANTE*, pages 492, 587, and 679, (*Murphy v.*)

INEVITABLE ACCIDENT.

See *ANTE*, page 375.

INJUNCTION.

See *ANTE*, page 687.

INSURANCE.

See *FIRE INSURANCE AND MARINE INSURANCE*.

J.

JUDGE'S CHARGE.

See *ANTE*, page 76.

JUDGMENT.

See *ANTE*, page 34.

JURISDICTION.

1. The Superior Court of the city of New York has jurisdiction of an action for a divorce, by reason of an adultery committed in this state, when the parties to the action were inhabitants of the state, and residing in it when the offence was committed, and continued to reside in it up to the time of suit brought, and the defendant then resided in that city. *Forrest v. Forrest*, 102
2. A court of equity has jurisdiction to order an instrument in writing to be delivered up and cancelled, upon the ground that it was either void in its origin, or has been rendered so by subsequent events. *Field v. Holbrook*, 597
3. The cases in which this jurisdiction may properly be exercised are the following:
 - 1st. When an instrument is alleged to be void upon grounds of which a court of equity alone has cognizance.
 - 2d. When the instrument, if uncanceled, would throw a cloud upon the plaintiff's title to such estate.
 - 3d. When the instrument is negotiable in its character, as a bill of exchange or promissory note; and, lastly,
 - 4th. When the plaintiff claims to have a defence to the instrument, valid in law, but which he is in danger of losing if the adverse party is suffered to delay the prosecution of his claim. *id*
4. These cases, although differing in their circumstances, rest substantially on the same principle, namely, that if the relief sought be denied, the plaintiff will sustain a present, or be exposed to the hazard of a future, injury and loss. Hence, the relief prayed for will be denied when it is certain that the plaintiff will sustain no such loss, and be exposed to no such hazard if the instrument is suffered to remain in the hands of the adverse party. *id*
5. Thus, the relief will not be granted when the instrument of which the surrender and cancellation are claimed, is on its face plainly illegal and void; nor when

it is a deed which, from its nature and contents, can throw no cloud upon the plaintiff's title, nor when a negotiable instrument is merged in a judgment.

In all these cases the relief is denied upon the single ground that its denial can work no actual prejudice to the plaintiff.

If the mere possibility that a void instrument may be used for vexatious purposes was a sufficient reason for ordering it to be delivered up and cancelled, the relief ought to have been granted in every case in which it has been denied, for in all this possibility existed.

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6. *Held*, in the case before the court, that as the facts upon which, as a condition precedent, the validity of the contract held by the defendant depended, had never occurred, the plaintiff was in no more danger of a recovery against him upon the contract than had it been on its face illegal and void. *id.*

7. *Held*, therefore, that the plaintiff was not entitled to demand that the contract should be given up, and that the demurrer to the complaint was well taken. *id.*

See *ANTE*, pages 682, 684, and 685, (*Hopkins v.*) and 687, (*Dresser v.*)

JURY.

See *BILLS OF EXCHANGE*, 8, and *ANTE*, 309.

L.

LANDLORD AND TENANT.

1. "Ordinary and yearly taxes," stipulated in a lease to be paid by the tenant, do not constitute in law any portion of the "rent" reserved by such lease.

2. Where a lease, executed in 1843, six years before the establishment of the "Croton Department" under the croton water acts, but after the passage of the act for supplying the city of New York with pure and wholesome water (1884,) contained a provision, that the lessee should pay "the ordinary and yearly taxes," *held*, that the annual water rent charged on the premises, according to the rates established by the Croton Department, is within the meaning of the covenant properly to be considered as embraced within that description of "taxes."

8. On a breach of the covenant for the payment of rent, in a lease containing the usual clause of re-entry, or the non-performance by the lessee of the covenant on his part, the lessee does not become a tenant by sufferance or at will; he continues tenant under the provisions of the lease, subject to the exercise of the right of re-entry by the landlord. Such right is asserted by the commencement of the action to recover the possession without actual entry, and without previous notice to the tenant to quit, and where the covenant broken is that for the payment of "taxes," the right of action is perfect without a previous demand of the tenant of the payment of such taxes, or of the repayment to himself if he has paid them for his tenant.

4. The provisions of § 8 of the act of 18th May, 1846, entitled "An act to abolish distress for rent, and for other purposes," providing for fifteen days' notice to the tenant before making re-entry, do not apply where the right of re-entry arises on the breach of any other covenant than that for the payment of "rent."

5. The clause of re-entry, as applicable to the covenants for the payment of rent or taxes, or any other sum certain, is in equity treated as a security for the payment of money, and precise compensation can be made for the breach of it, and in such case, the court will, in the exercise of its equitable powers, relieve from a forfeiture, even after judgment in the action of ejectment, on such terms as may be just.

6. A motion for leave to file a supplemental answer, settling up new matter, for the purpose of equitable relief, cannot properly be made at the trial. Such motion must be made on notice, or order to show cause. *Garner v. Hannah*, 262

7. When a plaintiff becomes the grantee and owner of premises, at the time occupied by the defendants, under an unsealed and unexpired lease, at a specified sum per annum, and becomes such owner, and an assignee of such lease, with the assent of such tenants, and they continue to occupy the premises after notice of such facts, and that the plaintiff is their landlord, and without objection, the plaintiff can recover for subsequently accruing rent, on a complaint which merely states that he is owner of the premises, and that the defendants occupied them at their request and by his permission, and that the use of them is worth \$284.14. But he can only recover at the rate specified in the lease under which the defendants entered. And they cannot set-off against rent accruing subsequent to their assent to occupy, as tenants of the plaintiff, a debt due to them prior thereto, from their lessor. *Peckham v. Leary*, 494

8. It is not error to admit, after a plaintiff has rested and the defendant has entered on his defence, proof of a cause of action, in support of which no evidence had been given when the plaintiff rested, when the defendant is not thereby prejudiced in establishing any defence he may have thereto. *id.*

9. The defendants, having assented to occupy, as tenants of the plaintiff, after notice to them that he was the assignee of the lease under which they were occupying, they cannot litigate the question whether the lease was assigned to the plaintiff with intent to defraud the creditors of their lessor. A creditor at large is not in a position to litigate that question. *id.*

LEX LOCI

See *ARTS*, page 84.

LIBEL

See *ARTS*, page 688.

LIEN.

See *ARTS*, pages 208 and 574.

LIMITED PARTNERSHIP.

See *ARTS*, page 549.

ML.

MARINE INSURANCE

A marine policy contained the following clause: "In case of a partial loss by sea—damage to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of a portion only of the contents of the packages so damaged, and not otherwise." Upon a loss occurring, the agent of the company instructed an auctioneer to sell the goods, which was not objected to by the assured. That agent was empowered to act in the separation and in giving such consent to an auctioneer. Upon the failure of the latter,

1. *Held*, that the loss, by reason of the failure of a mutual agent, should not fall on the company.

2. *Held*, that the inquiry was, purely, whether the company had assumed possession and control of the goods.

3. *Held*, also, that the agent, aforesaid, was not authorized, by reason of his authority, to concur in measures for the separation, to take such control.

4. *Held*, that express authority, or continued recognized acts of the same nature, were necessary. *Jellinghaus v. The New York Ins. Co.*, 1

5. The cost of repairing a vessel disabled by the perils of the sea must exceed a moiety of her value in the policy, making the usual deduction of one-third new for old, to warrant a recovery for a constructive total loss. *Fiedler v. New York Ins. Co.*, 282

6. In the first case, the vessel was valued at \$16,000 in the policy, and the jury found that the whole cost of repairs would have been \$12,000, thus (making the usual deduction,) leaving \$8000 as the actual cost for which alone the insurers could be liable. *Held*, therefore, that it was only a par-

tial loss that the plaintiffs were entitled to recover. 282

7. In an estimate of the cost of repairs, in order to determine whether there was a constructive total loss justifying an abandonment, surveyors' fees and general average losses are not to be included. *id.*

8. *Held*, in the second case, in which the policy was upon freight, that as there was not a constructive total loss of the vessel, and the cargo had been delivered, there had been no loss of freight for which the defendants could be liable. *id.*

9. Even where there has been a constructive total loss of the vessel, yet, if before an abandonment for that cause, the cargo has arrived and been delivered at its ports of destination, no loss of freight is recoverable. The freight, in such a case, belongs to the assured, and the loss is his if he fail to collect it. *id.*

10. The policy of insurance on which this action was founded, contained a warranty that the vessel insured should not use any foreign port or ports in the Gulf of Mexico, but by a memorandum afterwards indorsed on the policy, the vessel was permitted to use the port of Laguna for one voyage. She sailed on the voyage thus permitted, but on her arrival at Laguna was not permitted to enter and land cargo until she had made an entry at some neighboring port in Mexico. She then proceeded to Sisal a port in the Gulf of Mexico, about seventy leagues distant from Laguna, and after her arrival there, was driven ashore in a storm and totally lost. *Stevens v. Commercial Mutual Ins. Co.*, 594

11. *Held*, that the voyage from Laguna to Sisal, whether the custom regulations that prevented an entry at Laguna were or were not known at its commencement, was not protected by the memorandum on the policy, and was therefore a plain breach of the warranty in the policy itself, by which the defendants were discharged from the loss. *id.*

See *ANTE*, page 191.

MORTGAGE OF PERSONAL PROPERTY.

1. The law is now settled, that where a mortgage of chattels is presumed to be fraudulent on the ground that it was not followed by an immediate change of possession, an inquiry into the reasons, motives, or causes for not changing the possession is irrelevant, so far as it is designed to raise any distinct question for the determination of the court or jury.

2. The true and sole inquiry is, whether the presumption of fraud is repelled by evidence that the mortgage was made "in good faith, and without any intent to defraud creditors and purchasers?"

3. This is a question which, when it depends upon extrinsic proof, belongs to a jury alone to determine.

4. The verdict of a jury in favor of the validity of the transaction, if founded on pertinent evidence, is conclusive, and so also is the finding of a Judge where the cause is properly tried by a Judge without a jury.

5. A mortgage given by a partner on his separate property, in which a preference is given to a partnership creditor, is not for that reason fraudulent and void as against the separate creditors of the mortgagor, although in some cases the preference may be declared void at the instance of such creditors, upon a complaint filed on their behalf as a class.

6. A mortgage of personal chattels in all cases vests the legal title in the mortgagee, when by its terms or its legal construction he has an immediate right to the possession.

7. In all such cases, the mortgagee is, in judgment of law, the absolute owner of the property, and the mortgagor has no interest whatever that can be made the subject of a levy and sale under an execution.

8. This is true if the mortgage is otherwise valid, even when the mortgagor is permitted to remain in possession, for in judgment of law, he is in pos-

sion merely by the sufferance, and as the bailee of the mortgagee.

9. The provision of the Code which requires a Judge by whom a cause is tried without a jury, to file his decision in writing within twenty days after the trial is simply directory, and its non-observance furnishes no ground for the reversal of his judgment. *A. T. Stewart & Co. v. Slater, Townsend, et al*, 83

10. When it appears upon the face of a chattel mortgage that the mortgagor is to retain the possession and make sales of the goods mortgaged, the mortgage is absolutely void, and no question in relation to it is to be submitted to the jury upon a trial. But where the mortgage contains no such provision, the fact that the mortgagor, for a time retained the possession, and during this period made sales, is not conclusive, but is one of those that are to be considered by the jury in determining the question of actual fraud. *Williston v. Jones*, 504

11. A creditor who seeks to impeach a chattel mortgage upon the ground of the continuance in possession of the mortgagor, is bound to show that he was a creditor during the time that this possession continued. *id*

See *ANTE*, page 322.

MORTGAGE OF REAL ESTATE

See *ANTE*, pages 83 and 322.

MUNICIPAL CORPORATIONS.

1. The corporation of the city of New York have full authority, under their charter, to establish public markets and market-places in any location where, in their judgment, the interests or convenience of the public will be promoted by the measure.
2. The owners of houses and lots upon a market-place hold in subordination to the right and duty of the corporation, to do whatever is necessary for the maintenance of the market.

3. Such owners must, therefore, submit to whatever inconveniences and losses may result to them from a just exercise by the corporation of its powers and authority.

4. When the rebuilding or repairing a market requires a temporary obstruction in the street or passage in the market-place, the public and adjacent owners must submit to the inconvenience in consideration of the paramount interests of the public, for whose use public markets are established and maintained.

5. An adjacent owner may be entitled to maintain an action for damages against the corporation, where the obstruction, taking into view the nature of the work to be done, and the necessity of providing in the market-place suitable accommodations for those having the right of selling provisions in the market, is unnecessary and unreasonable, or when it creates a nuisance more noxious and offensive than is ordinarily incident to a market-place when kept in proper order and condition for market purposes, or when the obstruction is continued beyond a reasonable time; but whether, upon all or any of these grounds, the plaintiff, in such an action, is entitled to recover, is a question of fact for the determination of the jury.

6. *Held*, that upon the trial, these questions, upon the evidence that had been given, ought to have been submitted to the jury, and that the Judge erred in giving to the jury a peremptory direction to render a verdict for the plaintiff for the damages claimed.

7. Upon the trial, evidence was admitted to show the amount of the loss sustained by the plaintiff in his business, as the keeper of a refectory, by proving the actual diminution of his receipts, and the increase of his expenses, during the continuance of an obstruction created, by authority of the defendants, in the street in front of his dwelling, and by connecting the loss thus resulting with the obstruction, as its necessary or probable cause, and the Judge instructed the jury that the plaintiff was entitled to recover as part of his damages the loss thus

proved, and was not bound or limited to show what particular persons had withdrawn their custom from the plaintiff in consequence of the existence and continuance of the obstruction.

8. *Held*, that had the plaintiff made out his title to recover at all, the evidence in question was properly admitted, and the instruction given to the jury entirely correct, the case belonging to a class in which the loss of profits is a proper measure of damages, and the evidence directly tending to show the extent of such loss. *St. John v. Mayor, etc., of New York*, 315
9. The provisions in the ordinance of the corporation, organizing the street commissioner's department are entirely consistent with those of the act of the legislature, entitled "An act to amend the charter of the city of New York, passed April 2d, 1849." *Altamus v. Mayor, etc., of New York*, 446
10. Nor are any of those provisions repealed by the act further to amend the charter of the city, passed April 12th, 1853. *id.*
11. No contract for a sum exceeding \$500 can be made by the street commissioner for the performance of work in his department, although such contract may have been previously awarded by him to the lowest bidder, until a specific appropriation of a definite sum for the performance of the work shall have been made by the common council. *id.*
12. Whether such appropriation shall or shall not be made, rests entirely in the discretion of the common council; and until it is made, there is no contract which a court, either of law or equity, can enforce. *id.*
13. It seems that the street commissioner is not in such a sense an officer or agent of the corporation as to render the corporation liable to an action for his neglect or refusal to perform a duty imposed on him by an act of the legislature. *id.*

N.

NEGLIGENCE.

See *ANTE*, pages 225, 382, and 683.

NEW TRIAL.

See *ANTE*, page 382.

NONSUIT.

See *ANTE*, page 382.

O.

ORDINARY CARE.

See *ANTE*, page 683.

P.

PARTIES.

See *PRACTICE*, and *ANTE*, pages 43, 53, 182, 208, 382, and 587.

PARTNERSHIP.

See *AGREEMENT*, 7, and *ANTE*, page 34.

PARTY-WALLS.

1. Where the owner of two adjoining lots of ground erects a building upon each with a partition-wall extending partly on each lot, used as a support to each building, and necessary to such support, and thereafter he, or his representatives, conveys the houses and lots separately to different persons, each purchaser acquires an easement, for the support of the house conveyed to him, in so much of the party-wall as stands upon the other lot. *Eno v. Del Vecchio & Snyder*, 17

2. Neither purchaser can lawfully remove or interfere with such party-wall, without the consent of the other, so as to injure the other's building. If he do so, though for the purpose of making improvements within the limits of his own lot, he is liable for such injury. 17

3. No degree of care or diligence in the performance of the work will relieve him from liability, if injury to the other in fact is caused by making such improvements. The party makes them at his peril. *id*

4. Nor can he protect himself by making a contract for the work, with a third person exercising an independent employment. The act done is a trespass, and being done by the express direction of the party, both he and his contractor are liable for the consequences. *id*

5. If the injured building be in the possession of a tenant for a term of years, the owner can only recover for the injury to the building itself, and not for the interruption or interference with the possession, or use and enjoyment thereof. *id*

6. For such injury to the building the owner may recover, notwithstanding his lease to his tenant contains a covenant binding the tenant to make all alterations and repairs during the term. *id*

PENSIONS AND PENSION-STATUTES.

1. By the true construction of the Act of July 29, 1848, and of other Acts of Congress, a widow to whom a pension has been granted for the services of her husband, cannot pledge the certificate, by anticipation, to an agent employed to obtain the pension, to secure to him a compensation for his services.

2. Such a pledge, no matter to whom made, or for what purpose, is wholly void.

3. Hence, if the agent refuse to deliver the certificate, upon request, he is liable in an action for the recovery of its

value or of damages resulting from its detention. *Payne v. Woodhull & Ridgway*, 169

PLEADING.

1. GENERALLY.
2. COMPLAINT.
3. ANSWER.
4. COUNTER-CLAIM.
5. DEMURRER.

1. *Pleading Generally.*

1. An answer which specifying all the material allegations in the complaint denies them conjunctively, is not a general or specific denial within the meaning of the Code. A denial that all the allegations so connected as a whole are true, is not a denial of the truth of each separately considered, and is entirely consistent with an admission that some one or more of them is or may be true. *Young v. Callett, Ex.*, 437

2. In an action against the drawer of a bill of exchange, payable a certain number of days after sight, an averment, in the complaint, that the drawee accepted the bill, is equivalent to an averment that the bill was presented to him for acceptance, and that he had sight thereof when he accepted it. But an averment in the complaint, that the bill was "duly presented for payment," and "payment duly demanded," is not sufficient, within the rules of pleading established by the Code. The allegation that a bill was presented for payment, and payment demanded, is an allegation of facts; but whether these acts were so performed as to render them valid and binding is a question of law, to be determined by the court, and which cannot be withdrawn from its decision by the averment that they were "duly performed." *Graham v. Machado*, 514

3. To enable the court to determine the question, the facts from which the conclusion of law is to be drawn, and which the plaintiff will be bound to prove upon the trial, must be distinctly alleged in the complaint. The allegation that the bill was presented for

- payment, and payment "duly demanded," omits material facts, the evidence of which the court has no right to imply; namely, that the bill was presented to the drawer, and payment demanded from him. 514
4. So, where facts are relied on as sufficient, in law, to excuse such a personal presentment and demand, they should be set forth in the complaint, to enable the court to judge of the sufficiency of the excuse. *id.*
 5. The allegations that a presentment was "duly made," and payment "duly demanded," are not warranted by the provisions in § 162 of the Code, which declares that in pleading the performance of certain acts as conditions precedent, a general averment in the complaint, that all these acts were duly performed, on the part of the person so pleading, shall be deemed sufficient. In the opinion of this court § 162 has no application to averments in a complaint necessary to charge the drawer of a bill of exchange; but is applicable only to conditions precedent expressed in a contract, and which, by its terms, are to be performed by a party to the contract, who is also a party to the action, and the performance of each of which conditions by himself, but for this section he would have been required to state in his complaint or answer. *id.*
 6. Although presentment of a bill of exchange to the drawer, a proper demand of payment, and its refusal, and timely notice of such demand and refusal are conditions precedent to the liability of the drawer, yet they are not conditions to be performed by him, nor expressed in the contract to which he is a party, and therefore, are not conditions of the character of those to which § 162, by its very terms, alone refers. When it is sought to charge the drawer of the bill, an allegation in the complaint that it was duly protested for non-payment, is not equivalent to averments that it was presented for payment to the acceptor, and that payment was demanded from, and refused by him. *id.*
 7. Although, in a notice given by a notary to the indorser of a promissory note, or the acceptor of a bill of exchange, a statement that the note or bill, at its maturity, was protested for non-payment, is deemed a sufficient notice of a demand and refusal of payment, the assertion that the same words, as an averment in a pleading, must receive the same construction, rests upon no principle, and upon no sufficient authority. 514
 8. It is an error to suppose that any such rule of construction was laid down, expressly or impliedly, as a rule of pleading, by the Court of Appeals, in *Coddington v. Davis* (1 Comstock, 182), *id.*
 9. It was upon the grounds above stated that the court placed its decision, in which all the Judges concurred; but it was also held, by Woodruff, J., that the complaint was fatally defective in not stating at what time the bill in suit was presented to the drawer, nor when he had sight thereof, nor when he accepted it.
 10. He held that the want of these averments, admitting the truth of all the allegations in the complaint, rendered it impossible for the court to say that payment of the bill was demanded, or refused, on the day when, by law, such payment was demandable. *id.*
 11. In an action to recover the possession of real estate, a complaint which states that, on the day named, a person, whose name is given, was in possession and seized thereof in his own right in fee, and died so seized and possessed; that the plaintiffs are his only heirs at law, and, as such, are seized in fee and entitled to the possession; that the defendant is wrongfully in possession, claiming title, and refuses to give up possession, though requested so to do, states facts constituting a cause of action. *Garner v. Manhattan Building Association*, 539
 12. The defendants, by their answer, and by the evidence given at the trial, claiming a right to the possession under an unexpired lease, executed by the plaintiffs' ancestor, in his life-time, *held*, that it was competent for the plaintiff to prove in reply any facts which put an end to the lease, or gave a right to the plaintiffs to require the possession to be given up to them, and

the defendants' possession to be wrongful. 544

18. In an action upon a promissory note, which is set forth in the complaint, the word "signed" prefixed to the signature of the maker, is a sufficient averment that the note was made by him, and the word "indorsed" prefixed to the signature of the payee is a sufficient averment of his indorsement. Where the action is against an individual as the maker of the note, and it is signed in the name of a partnership, and there is no averment that it was so signed by the defendant, the complaint is bad upon demurrer, as not showing upon its face an individual liability. *Price v. McClave*, 544

14. As against an indorser, an averment in the complaint that the note was "protested for non-payment," is not equivalent to an averment that the note was presented to the maker and payment refused; since a protest may, in fact, have been made, and yet the note not have been presented for payment to the maker. The complaint, therefore, as not showing the facts necessary to be proved to charge an indorser, is bad upon demurrer. *id.*

15. Although a defendant whose answer is demurred to, may, as a general rule, assail the complaint as not containing facts sufficient to constitute a cause of action, it is doubtful, whether the rule applies where the demurrer is merely to a counter-claim, which, although contained in the answer, forms no part of the defence that the answer sets up. *Graham v. Dunigan*, 629

16. Where a tenant in dower, to whom, as such, certain apartments in a dwelling-house have been assigned, has been compelled for the protection of her life estate, to pay the taxes on the whole building, she is entitled to recover against the tenant occupying the rest of the house such an amount of the taxes so paid as may be justly apportioned to that part of the building that such tenant occupies. *id.*

17. There is no force in the objection, that there is no contract by the defendant to pay the sum demanded. The law implies a contract by the defend-

ant to repay his just proportion of the taxes, as so much money paid for his use. 629

18. The court held the counter-claim to be bad, for reasons applicable only to the special circumstances of the case. *id.*

19. On demurrer to a complaint in an action for libel, containing the averment authorized by section 164 of the Code, that the words complained of were published "concerning the plaintiff," the court is bound to assume that the article referred to the plaintiff; and the plaintiff, under such a complaint, may prove they were spoken of and concerning him. *Wesley v. Bennett*, 668

20. Where the words alleged in a complaint in an action for libel are fairly susceptible of a construction which would render them libellous, the complaint will be sustained upon demurrer, although the words may also be interpreted in a way which would render them innocent. *id.*

2. Complaint.

See *ANTE*, pages 514, 589, 544, and 688.

3 Answer.

See *ANTE*, page 487.

4. Counter-claim

1. In an action against two or more, as joint debtors for money lent, one of the defendants cannot defeat the action by setting up, by way of set-off or counter-claim, a claim to damages in his own favor individually, against the plaintiffs, for fraud and failure, and neglect to perform their duty to him as his agents under a power of attorney authorizing them to attend to his private business, to manage the same for his benefit. *Peabody, et al. v. Beach, Bloomer, et al.* 63

5. Demurrer.

1. Where the plaintiffs and other persons

were joint owners of a steamboat, and entered into a contract with one of the defendants, by which the latter hired the boat and agreed to pay to the owners \$100 per day for the use thereof; in an action to recover such compensation all the owners must join. *Coster, et al v. N. Y. & Erie R. R. Co. & D. Drew,* 48

2. A joint cause of action vested in two or more cannot be split up into several at the option of those in whom it is vested; the defendant is not liable to be vexed with two or more separate suits for the same cause of action, and be compelled to litigate with each part owner separately. *id.*

3. If any of the boat owners refuse to become plaintiffs, they should be made defendants.

The fact that the part owners, who are not made parties, sold their shares or parts of the boat to the defendant, for whose benefit the same was transferred to the other defendant several months after the hiring, is not a sufficient reason for not making them parties, when it is in nowise alleged that they also sold or relinquished their interest in the compensation for the use of the boat before the time of the sale. *id.*

4. When, in the agreement referred to, the hirer agreed to pay all the expenses of running the boat, and keep her in good repair so long as the owners should permit her to remain in the defendants' possession, though it discloses a probable intention to run the boat, it does not compel the defendants to do so; so long as the defendant pays the hire he may run the boat or not at his pleasure. *id.*

5. And an averment that the boat has been greatly damaged, impaired, and deteriorated, and is constantly depreciating in value, by reason of being withdrawn from navigation and laid up at the dock, and from want of care and attention in her safe keeping and preservation, and from the defendants' neglect to keep her in good order and repair, and in a state fit for navigation, is not a proper form of averring a breach of the agreement to keep the boat in repair; and if it were, it would not warrant the plaintiffs' pray-

er for relief, viz., a recovery of the value of the boat. 48

6. If such a cause of action is to be claimed on the ground that the defendants' acts are tortious, and subject them to the payment of the value of the boat as damages, then there is an improper joinder of causes of action, one in tort, the others in contract. *id.*

7. The defendant, to whom the title of the other part owners has been transferred, is not liable to the plaintiffs for the hire, or for the neglect of the other defendants to repair. *id.*

8. Whether a suit in equity will or will not lie to restrain the owners of a major portion of a vessel from removing her from the state, or whether the jurisdiction of such matters is in admiralty only, it is clear that such a suit cannot be joined with an action on the contract for the hire of the vessel. *id.*

See ANTE, page 629.

PRACTICE.

1. ABATEMENT.
2. AMENDMENTS.
3. ANSWER.
4. ANSWER SUPPLEMENTAL.
5. APPEAL.
6. ARBITRATION.
7. ARREST.
8. COMMISSION.
9. COMPLAINT.
10. CONTEMPT.
11. COSTS.
12. DEFENCES, Election of.
13. DISCOVERY.
14. EXAMINATION OF A PARTY.
15. INJUNCTION.
16. INQUEST.
17. INTERPLEADER.
18. IRREGULARITY.
19. ORDERS.
20. PARTIES.
21. RECEIVER.
22. REFERENCE.
23. SERVICE OF PAPERS.
24. SUBPOENA DUCES TECUM.
25. SUMMONS.
26. SUPPLEMENTARY TO EXECUTION.
27. TRIAL.
28. UNDERTAKING.

1. *Abatement.*

1. An action for the recovery of possession of specific personal property wrongfully detained, against a sole defendant, wholly abates if the defendant dies before verdict or judgment; and the court has no power in such a case to order the action to be continued against the personal representatives of the defendant. *Hopkins v. Adams*, 685

2. *Amendments.*

2. Where a case, upon a report of referees, was made before the decision, (in 3 Kern. 341,) which does not conform to that decision, *held* that it might be made to conform to that rule after the determination of the General Term on appeal. *Sheldon, et al. v. Wood, et al.*, 679
3. This court hold, that they have the power, under § 174 of the Code, to allow exceptions to the report of referees, etc., to be filed *nunc pro tunc*, after the ten days fixed by the Code (§ 272 [227]) have elapsed. *id.*
4. The court has no power to order a judgment to be entered *nunc pro tunc*, as of a date prior to the actual judgment, to enable a party to affect the amount of his costs. *Moore v. Westervelt*, late sheriff, 684
5. A party is entitled to have his costs adjusted, according to the Code, as it existed at the time of the verdict, as it respects all items prior to that date, when the verdict is followed by a judgment entered thereon. The "recovery," which, by § 304, gives the right to such costs, means the verdict. *id.*
6. Under section 172 of the Code, a plaintiff cannot amend his complaint more than once, as a matter of course, without leave of the court. *White v. The Mayor, etc., of New York*, 685
7. If he amends it before answer or demurrer, his right to amend of course is exhausted; and if his amended complaint is demurred to, he cannot amend it a second time without leave of the court. *id.*

8. Upon an appeal to the General Term, the court may treat the pleadings as having been amended so as to conform to the facts proved, in any respect in which the court ought clearly to allow an amendment upon application at Special Term. *Bowdoin v. Coleman*, 182

See *ANTE*, pages 661 and 687, (*Hecker v.*)

3. *Answer.*

9. It is no defence to an action on a promissory note that one of the plaintiffs has commenced an action upon the note in another state, although an attachment has been issued therein, which has been levied upon property sufficient to satisfy the demand.
10. In an action by an indorsee against the maker of a promissory note, an answer which denies knowledge, etc., sufficient to form a belief whether the allegation of the complaint that the payee of the note indorsed it to the plaintiff, is not frivolous.
11. Such answer may be false, but, if so, the remedy is by motion to strike it out, not by motion for judgment on account of its frivolousness.
12. Where an answer contained two defences, and the plaintiff moved for judgment for the frivolousness of the answer, and one defence was held good and the other frivolous;—*Held*, that the latter defence might be stricken out, under the notice that the plaintiff would ask other and further relief, etc. *Hecker v. Mitchell*, 687

4. *Answer Supplemental.*

13. Section 177 of the Code has provided a uniform mode of bringing before the court matters of defence which existed when the answer was put in, but of which the defendant was then ignorant, as well as matters of defence which have arisen after issue joined. That is to be done by supplemental answer.
14. As section 469 of the Code continues in force, all the pre-existing rules and

practice of the courts, not inconsistent with the Code itself, the settled rules and practice of the courts of law and of chancery, must be consulted, in determining whether the application is, in substance, one of strict right, or is addressed solely to the discretion of the court.

15. Such applications should be granted, as a general rule, unless they have been too long delayed, or are clearly frivolous, or the defence presented is so inequitable in its nature that the permission sought should be refused for that cause.

On the facts of this case, *held*, that the motion could not, properly, have been denied on the mere ground of *laches*.

16. The court will not, as a general rule, after the time to answer has expired, allow a supplemental answer to be put in, to set up a technical defence, which may operate as a forfeiture of a just claim. But when the cause of action is one of equitable cognizance, although it may be one of strict legal right, and can be enforced only by depriving a defendant of property bought in good faith from an assignee of a common debtor of the plaintiff and the defendant, and which property, on principles of general equity, might as properly have been applied to satisfy the claim of the defendant as that of the plaintiff, the court will not attempt, on such a motion, to determine the equities of the parties, and refuse leave to set up the defence.

17. The court will not do so, when, upon the settled principles of equity proceedings, the particular defence may be overruled, if giving effect to it according to its legal operation, would defeat a cause of action contrary to the intent of the parties to the transaction which constitutes the supposed defence.

18. When it cannot be well decided, except upon a hearing of the whole case, whether as between the parties to the action, it would be inequitable to give effect to the defence, if proved; and the court is competent to dispose of that question at the hearing, as may be just, a supplemental answer will be allowed. *Hoyt v. Sheldon, Ex.*, 661

5. Appeal.

19. When an action is tried by the court, without a jury, it cannot be referred to the General Term for its decision, primarily, of any question of fact or of law.

The only mode of obtaining a review of any decision on such a trial, whether made during its progress or at its close, is by an appeal under § 348 of the Code. *Mallory v. Wood*, 657

20. To render an appeal, from a judgment of a court at General Term, to the Court of Appeals, a stay of all proceedings upon the judgment appealed from, a copy of a proper undertaking must be served with the notice of appeal. *Cushman v. Martine*, 660

21. Filing and service of a copy of an undertaking on a day subsequent to that on which the notice of appeal was served, will not operate as a stay. *id.* The court which rendered the judgment appealed from will not, on such a state of facts, order proceedings stayed pending the appeal. *id.*

It will not so order unless the proceedings upon appeal are amended and validated upon a motion made for the purpose, and with the assent of the sureties in the undertaking. *id.*

22. When, upon an appeal, an undertaking has been given, fully complying with the statute, and the appeal is perfected, the appellant does not remain responsible for the consequences of the misfortune and insolvency of his sureties. *Willett v. Stringer, et al.*, 686

23. But there is a substantial distinction between the case of an injunction and that of an appeal. In the case of an injunction, if the protection, by the security substituted for an injunction, should become entirely lost, as by the insolvency of all the obligors, the right to the injunction would be restored; and if it is partially diminished, the question remains open, as it was originally, what will afford the party reasonable indemnity. *id.*

24. It is a question of judicial discretion, whether to allow a bond given on a claim of personal property, or for an

injunction, to remain, where one surety has become insolvent and the remaining surety solvent, or direct that fresh surety be given.

25. On appeal from an order rendering judgment on a demurrer as frivolous, the order will not be reversed unless the court are of opinion that the demurrer was well taken. It will not be reversed merely because the court may think it was not frivolous. *Laverty v. Griswold*, 12 N. Y. Legal Obs. 316. *Wesley v. Bennett*, 688

26. When an action is tried before the court without a jury, and a decision is made disposing of the case, except that a reference is directed to take an account, and an order is entered in conformity to the decision, an appeal from such order to review decisions made at the trial, will be dismissed. They can only be reviewed on an appeal from the judgment, which appeal cannot be brought until the account has been taken, and all questions arising upon it have been disposed of at Special Term. Until then, the order entered on the final decision made after the trial, does not become a judgment within the meaning of that word as defined by the Code. *Lawrence v. Farmers' Loan and Trust Company, et al.*, 689

27. The "judgment" from which an appeal may be taken to the General Term, means the same thing as a judgment from which an appeal may be taken to the Court of Appeals. Appeal dismissed. *id.*

6. Arbitration.

28. A lot of land, subject to a lease containing a covenant of renewal, at a rent to be agreed upon by the parties, or fixed by arbitration, is not an "unencumbered" lot, and when sold to the tenant holding the covenant, such lot cannot be deemed to have been sold as an "unencumbered" lot.
29. To state, in a pleading, the nature and source of the information upon which the party relies in making an averment of facts on information and

belief, does not vitiate an independent averment of such facts.

30. Nor does it detract from the force of such averment, that the clause of the pleading in which it occurs, refers, e. g., by the use of the word "therefore," to the antecedent clauses, in which the grounds of the information and belief are stated. *Borrowe v. Millbank*, 680

31. In an action brought to set aside an award of an umpire, to whom it was submitted to value a lot of land at its full and fair worth at private sale, considering the same as an "unencumbered lot," the complaint charged that his valuation "was not made upon considering the same as an unencumbered lot, but . . . at a less value, and such valuation was without his powers as umpire."

32. *Held*, upon demurrer, that the complaint sufficiently showed that the umpire had exceeded his authority.

33. When an arbitrator or umpire exceeds his authority, the affect of his act to avoid his award is the same, whether the error was committed consciously or through mistake. *id.*

7. Arrest.

34. Although a debt was fraudulently contracted, or an obligation was fraudulently incurred by a defendant, yet if, subsequently thereto, the plaintiff, with full knowledge of the fraud, settles the original debt or obligation, and enters into a new contract with the defendant, upon different terms, and upon additional consideration, in an action upon the new contract, the defendant cannot be held to bail merely because the original debt or obligation was fraudulently contracted or incurred. In such a case, if the debt for the recovery of which, or the obligation on which the action is brought, was not fraudulently contracted or incurred, the defendant cannot be held to bail. The order, refusing to vacate an order of arrest, on which the defendant was held to bail in the sum of \$45,000, reversed. *Dwight v. Merchants' Bank of New Haven*, 659

35. The defendant, prosecuting the business of a banker, the plaintiffs, in November, 1855, employed him to act as their banker, receive their deposits, collect their bills, etc., and credit them with the amount, agreeing he might use the moneys, and he agreeing to pay their drafts on him when presented, and interest on the balances at the rate of five per cent. They continued to act under this agreement, and on the 13th of August, 1857, the plaintiffs remitted to the defendant a draft for \$4000, payable the 25th, to be collected and passed to their credit, under this agreement. Defendant received it on the 15th, and collected it on the 25th, and used the money. On the 24th, he knew he was insolvent, and on the morning of the 25th, avowed his purpose to suspend, and did soon after the \$4000 was collected. *Bussing, et al. v. Thompson,* 696

36. *Held*, that the defendant did not receive the money in a fiduciary capacity. His failure after he received, and before the maturity of the draft, did not annul the agreement between him and plaintiff or convert him into a trustee. *id.*

37. Also, that he did not convert the money to his own use "wrongfully," within the meaning of that word, as used in the Code; nor was he guilty, in judgment of law, of a fraud in using the money; nor was he guilty of a fraud in incurring the obligation to pay the \$4000 to the plaintiffs. *id.*

38. Therefore, also *held*, that the defendant could not be held to bail in an action to recover the \$4000, he having failed to pay it, on a demand made subsequent to his failure. *id.*

8. Commission.

39. The Judge before whom proceedings supplementary to execution, under § 292 of the Code, are pending, has no power to order a commission to be issued for the examination of witnesses residing out of the state, to take testimony to be used on such proceedings. *Graham v. Colburn,* 678

9. Complaint.

40. A complaint for damages, in consequence of injuries received by the plaintiff, by the giving way of and falling down of a back stoop and stairs, on a certain building owned by the defendant, alleged that said stoop and stairs were in a bad condition and repair; that the defendant, as owner, was bound to keep the premises, and especially the said stoop and stairs, in a good condition and repair, and had neglected and refused to do so; and that in consequence of such neglect and refusal, the plaintiff had sustained the injuries, (specifying them,) complained of, and demanded judgment for \$5000. *Corey v. Mann,* 679

41. *Held*, bad on demurrer, because it appeared from the complaint, that the premises were occupied, not by the defendant, but by third persons, and consequently it was upon the tenants, and not upon the defendant, as owner and landlord, that the duty of keeping them in repair presumptively rested. Besides, the averment that the defendant was bound to repair, without stating any facts from which the obligation resulted, was plainly insufficient, it being a conclusion of law. *id.*

42. An allegation in the complaint that the note was made by the defendant, A— B—, and "for a further inducement to the plaintiff to accept the same, was indorsed by the defendant, C— D—, and was then delivered to and indorsed by the plaintiff," *held*, insufficient to charge C— D—, the indorser, with liability, where the note was made payable to order of the plaintiff. *Murphy v. G. F. & M. J. Merchant,* *id.*

43. It seems, that it is very doubtful whether any evidence of a parol agreement, varying the legal rights or obligation of the payee and second indorser, can be admitted. *id.*

44. An averment in a complaint upon a protested bill of exchange, that the plaintiff is duly authorized to bring an action on behalf of a foreign banking company, (the owners of the bill,) as one of its registered officers, is a con-

clusion of law merely. He should set forth the existence and terms of the act under which the bank was organized, and an authority given to him as one of its registered officers to sue on its behalf. Without this the complaint is insufficient. 678

45. If it should appear that such an authority was given, the plaintiff could maintain the action in his own name, on behalf of the bank, not only on grounds of international comity, but as a trustee of an express trust, within a reasonable interpretation of the Code. *Myers v. Machado*, 678

10. Contempt.

46. It is contempt of court for a person who knows of the existence of an order for his arrest, in the hands of an officer intending to serve the same upon him, to prevent willfully, and by open force, either made or directed, the service of such process. *Conover v. Wood*, 682

47. But it is essential to constitute the offence in such a case, that the party should be aware that the officer had an order which he might be desirous to execute. *id.*

48. Where, on an order to show cause why a party should not be punished for contempt in resisting the service of process, the opposing affidavits render it clear that the party was innocent of any intention to resist service, the court will not direct a reference to enable the moving party to introduce proofs of such intention. *id.*

See *ANTE*, pages 683, 685, and 687.

11. Costs.

49. Where one of several defendants, who has by separate answer made a separate defence, and is not united in interest with the others, succeeds on the trial, he is not in any action, legal or equitable, entitled to costs, as of course, but must apply for them to the court. (Code, § 306.) *Williams v. Horgan*, 658

50. But if there is a union of interest,

and the defendants have, by their answer, denied the allegations of the complaint, whether they answer jointly or separately, and if the case be one of those mentioned in § 304, then, if either defendant obtains a verdict, he will, as a general rule, be entitled to costs, as a matter of course, under § 305. 658

51. But, although the defendants be sued as joint contractors, yet, if they answer separately, and either sets up a defence personal to himself only, as infancy, or the like, and succeeds at the trial, it is within the discretion of the court to award him costs, or to deny them to him. *id.*

52. The Code, as it read in 1856, does not authorize an extra allowance of costs in an action by a judgment creditor, to set aside transfers of property made by his debtor, and to procure the appointment of a receiver of such property, and of its proceeds and profits, and to compel the assignee to account for and deliver such property, proceeds and profits to the receiver, to be applied by the latter to pay the judgment. It is not one of the actions specially named in § 308. *Buchanan Morrell, et al.*, 658

53. It is not an action for the recovery of money, within the meaning of those words, as used in § 308, and sub. 4 of § 304, of the Code. *id.*

54. Those words are used in the same sense in both of these sections, and do not include actions in which relief, other than a judgment for money, must be granted to enable a plaintiff to maintain the action, although the ultimate result in view and purpose is to realize money. These words, as here used, mean an action in which the plaintiff merely seeks to recover a judgment for the sum named. *id.*

55. When persons, severally liable, are united as defendants, but appear by different attorneys, and answer separately, and after issue joined, and after the action has been noticed for trial, settle, and, as part of the terms of settlement, agree to pay to the plaintiff the legal costs of the action, the plaintiff is entitled to only one bill of costs.

He cannot have a full bill against each defendant. He is entitled to all the disbursements actually made, and which would have been taxable if the defendants had been sued separately. *Latham v. Bliss*, 661

56. He is not entitled to a term fee for a term commencing subsequent to the settlement, although the action had been noticed for such term, and a note of issue filed, and a calendar had been made for such term, containing such action. *id.*

57. If an action be brought in a court of record against a sheriff for not returning an execution, and the plaintiff recovers less than \$50 damages, he must pay the costs of the action. It is not one of the actions of which, according to § 54 of the Code, a Justice of the peace has no jurisdiction. This result must follow, even if it be conceded that § 53 is not sufficiently comprehensive to confer jurisdiction of such an action on a Justice. Subdivision 3, of § 304, cannot be construed as referring to § 53 as well as to § 54. *Laughran & Dillon v. Orser, sheriff*, 697

58. Section 53 does not grant jurisdiction of any action in which the amount claimed exceeds \$100. Section 304 does not permit the amount claimed to affect the question of liability for costs, but only the amount recovered, unless the action be one of those enumerated in section 54, or one of those in which, by sub. 4 of section 304, a party recovering less than \$50 will recover as much costs as damages. *id.*

12. Defences, Election of.

59. Fuller having a cause of action against Read, sued him; Read, after that, sued Fuller on a demand which fell due after Fuller's suit was brought, and Fuller, in his answer set up as a counter-claim, the cause of action on which his suit was brought.

Held, that Fuller, in that stage of the suits, could not be compelled to elect to prosecute his claim in only one of such suits, and to abide by such election. That the court should not obstruct the orderly course of proceeding

in either action, until both were at issue on the merits. 697

60. If it then appeared that the merits of both could be fully tried, and full relief given in any one suit, the proceedings might properly be stayed in the other until that one was tried; that the pendency of the suit first brought was no bar to the right of the plaintiff therein to set up the matter of it as a defence to the suit subsequently brought against himself. *Fuller v. Read*, commenced October 28, 1857; *Read v. Fuller*, commenced October 31, 1857, *id.*

13. Discovery.

61. A petition by one party for an order directing the other party to make a discovery of books and papers in his possession, will not be granted when it prays for a discovery generally of all the books, papers, and correspondence of the adverse party, containing entries, during a period of several years, relating to purchases of a specified commodity. A petition must show that entries affecting or throwing some light on the matters in controversy exist, or enough to call upon the adverse party to answer whether they do or not, that they are material, and state enough, if not denied, so that the court can see they are material, in addition to stating the other matters prescribed by the rules regulating such applications. *Cassard v. Hinman Same v. Same*, 695

62. In a proceeding for the discovery of books and papers, (which is a summary and, in some respects, an extraordinary remedy,) the court is to be governed by the principles and practice of the (late) Court of Chancery, in compelling discovery. So say the Revised Statutes, (2 R. S. 197, § 31.) In this respect there is no reason to believe that the legislature intended to introduce any new rule, when the provisions of § 388 of the Code were enacted. *McAllister v. Pond, et al.*, 702

63. The rules of the court (8, 9, 10, etc.,) contemplate the setting forth, by petition, of facts and circumstances which show that the discovery is necessary,

and that the party applying therefor is entitled to demand it of the adverse party. A mere statement that in the opinion of counsel the discovery sought is necessary, will not suffice. Such a statement is requisite, but it is cumulative. 702

64. One of the first facts which should appear on an application for a discovery of books and papers, for the purpose of preparing for trial, is that the applicant has not in his possession the same information, or if he has, that he has not the means of establishing, by other available proof, the contents of such books or papers. *id.*

65. In this case it in no wise appeared, by the petition, that the plaintiff was ignorant of any particular which was necessary to enable him to prepare for trial, or which was contained in the books and papers sought to be produced. There was a failure to show a want of the requisite information to enable the plaintiff to prepare for trial; and it was not stated that the plaintiff had any need of the defendants' books and papers, for the purpose of establishing the particulars of the accounts between the parties; nor that he could not prove, without the production sought, every fact which was material to his case. *id.*

66. And besides, it appeared that the books of the defendants, of which discovery was sought, had been freely offered to the plaintiff's attorney for examination and inspection, and he had omitted to avail himself of the opportunity. Motion denied. *id.*

14. *Examination of a Party.*

67. On an analysis of § 399 of the Code, as amended on the 13th of April, 1857, it may be understood as follows:

1st. A party to an action or proceeding, and a party for whose immediate benefit a suit is prosecuted or defended, may be examined as a witness in his own behalf, the same as any other witness, in all cases, except when the adverse party, or adverse person in interest is not living, or, when the opposite party is an assignee, administra-

tor, executor, or legal representative of a deceased person. *Burling v. Ogden*, 681

2d. Ten days' notice, in writing, of such examination must be given to the adverse party, specifying the points upon which the party or person is intended to be examined.

But in special proceedings of a summary nature, such reasonable notice shall be given, as shall be prescribed by the court or Judge. *id.*

3d. When notice of such examination is given, and the opposite party resides out of the jurisdiction of the court, such party may be examined by commission issued and executed as now provided by law. *id.*

4th. If a party or person in interest has been examined under this section, the other party or person in interest may offer himself as a witness in his own behalf, and shall be so received.

68. Now, the ten days' notice, and the points of examination, apply only to the party or person in interest offering himself as a witness, on the original application, in his own behalf—not to the opposite party; the law admits him, of course, and at large upon all the issues, whether his examination is upon commission or otherwise. *id.*

69. On an application for an examination of an adverse party as a witness under section 391 of the Code, it is not the practice to make an order in such cases, that such party attend and be examined. The notice provided for by that section, specifying the time, place, and the Judge before whom the examination is to be heard, is sufficient without an order. The 392d section seems to require that a summons shall be issued by the Judge to compel the attendance of the party, such as was issued under the Revised Statutes, upon a conditional examination. (2 R. S. 393, § 10.) *Gaughe v. Laroche*, 685

70. Therefore, both the notice under section 391 of the Code, and the summons under the Revised Statutes, appear necessary, at least to lay the ground for a punishment, or process to punish, as for a contempt. *id.*

71. If the party refuse to attend and testify, he may be punished as for a con-

tempt, and his complaint, answer, or reply may be stricken out. (§ 394.) 685

72. Thus, then, if the applicant finds it most important to have the actual examination, he may procure the attendance by the warrant under the statute. If he is content with the remedy given by the 394th section, he may adopt that, and have the pleadings of such party stricken out, and no doubt may proceed as for contempt, or may have either mode of redress. Where it is required that the party to be examined produce books and papers, the proper course is the service of a *subpoena duces tecum*. *id.*

73. Section 391 of the Code, gives to either party to an action, an option to have an adverse party examined before, instead of examining him at the trial. It is error to deny to the party claiming it, the right to have such an examination, on the mere ground that the party sought to be examined, prefers to be examined at the trial, and offers to stipulate to then attend, so that his examination can then be had. The fact that other suits against the party sought to be examined are pending, which are brought by other plaintiffs, and depend upon the same general facts, is not such cause as will justify an order exempting a defendant from examination before the trial. To refuse to compel a defendant to submit to an examination before the trial, merely because he prefers to be examined at the trial, would make it optional with the defendant, whether he would be examined before the trial or not, whereas the Code gives the option to the party who wishes to examine his adversary, whether the examination shall be had before or at the trial. *Green v Wood*, 702

15. Injunction.

74. In ascertaining the damages on a reference upon the discharge of an injunction, the question arises, whether any other allowance can be made for costs or counsel fees, than that which the Code permits to be recovered by a successful party against his adversary? There may be allowed to the prevailing party, upon the judgment, certain sums

by way of indemnity for his expenses in the action, which allowances are in this act termed costs." The measure of compensation between attorney and client is left to the agreement, express or implied, of the parties. (Code, § 308.)

Held, that the import of this provision is, that the unsuccessful party shall only be subjected to the charges specified as costs, where the action takes the ordinary course. But where there is a special contract as to damages, (and the injunction bond amounts to this in fact,) it will control; it will afford a new rule of estimate, and is not to be affected by the ordinary rates of allowance. *Wilde v. Joel*, 671

75. Another question then arises, whether, if counsel fees are allowable, they can only be allowed when actually paid, as it is the damage sustained which is to be repaid, not any contingent liability?

The Code has left the compensation of attorney and counsel to the operation of any agreement express or implied. Counsel can have the same remedy for services rendered, which they possessed before its passage.

If a party enjoined, has, by reason thereof, incurred a liability, and the claim thereon is reasonable, a bond of indemnity would appear to cover such a liability as much as an actual advance; therefore, counsel fees, although unpaid, if reasonable, can be recovered in the shape of damages, in an action upon an injunction bond. *id.*

76. And then another important question arises, what is the effect of the Code as to the mode of ascertaining damages by an assessment under an order of reference? What does the report, if confirmed, settle? Can it be followed by a judgment for payment of the amount? If it can, as to the principal and party to the action, can it be as to the sureties? or is the only remedy an action on the undertaking?

Held, that under the provisions of the Code on this subject, a reference establishes the amount of damages, so that they become finally liquidated as between the parties. Where there are sureties, that fact shows the propriety of directing notice to be given to them. Legal defences, which are wholly independent, will arise, and may be taken

- in the action on the undertaking. There is no authority in the Code to order a judgment upon the bond for the amount ascertained by the reference to be payable, even against the plaintiff and obligor. It is, therefore, the safest course to bring an action upon the undertaking. *id.*
77. Although the provisions of the Revised Statutes, (2 R. S. 190, 195,) which are presumed to be in force, that the Chancellor shall direct the delivery of any bond executed under the provisions of that article to the person entitled to the benefit thereof, for prosecution, whenever the condition thereof shall be broken, or the circumstances of the case shall require such delivery, yet the court might well decline the delivery up of an undertaking on file in these cases, (see Code, § 423,) as an inspection of it is all that is necessary, in order to draw the complaint; and upon the trial the clerk can be subpoenaed to produce it in case of dispute. The items disallowed and allowed by the court *seriatim*, as damages on dissolving the injunction in this case, will be found stated at the conclusion of the opinion. *id.*
78. No court in this state can rightfully enjoin a party from proceeding in a suit in another court of the state, having equal power to grant, in such suit, the relief sought by the complaint on which such injunction is asked. *Bennett v. Le Roy*, 683
79. If, in such a case, a party who has brought an action in one court be enjoined from proceeding further therein by an injunction issued from another court of co-ordinate powers, and if he proceed, notwithstanding such injunction, his proceedings will not be set aside for that cause, as irregular. But, in furtherance of justice, the party prejudiced by them will be relieved on such terms as may be just, but only upon consenting to a dissolution of the injunction, so far as it may interfere with the further prosecution of such action. *id.*
16. *Inquest.*
80. Absence of material witnesses is sufficient cause for postponing a trial, when it is shown that they are material, and that due diligence was used to procure their attendance.
81. When that is not shown, a trial should not be postponed on an allegation that such grounds for it exist, nor will an inquest, taken upon a denial of a postponement asked on such grounds, be set aside, merely because the affidavit to procure it was drawn, and the motion for it was made by an attorney's clerk, who did not know enough to present properly to the court the facts then known to exist, and which formed the grounds of the relief sought.
82. Nor will a regular inquest be set aside if a defendant delays to move until he has been arrested upon an execution against his person, issued after the return of a previous execution against his property, when it appears that paying the judgment, will be the payment of a just debt, and a protection to the defendant against all claims upon the demand on which it is recovered that may be made by the third person, whom the answer, as a defence, alleged to be the person with whom alone it was contracted. *Fake v. Edgerton*, 653
83. In an action of libel, where the defendant omits to answer, if it be shown to be highly probable that difficult questions of law may arise respecting the construction of the complaint, the legal effect of the default, upon its allegations as to the meaning of the words alleged to be libellous, and respecting the admissibility of evidence in mitigation, the court may, it seems order the plaintiff's damages to be assessed by a jury at a stated Trial Term of the court, instead of directing them to be assessed by a sheriff's jury. *Cazneau v. Bryant*, 668
84. But when, after a default in not answering the complaint, a plaintiff moves for an order that his damages be assessed by a jury in open court, and that motion is denied, and an order is entered that they be assessed before a sheriff's jury, such decision is conclusive in respect to any grounds for the application then existing and

then known to the moving party, unless leave be given, in the order which is made, to renew the motion on new or further affidavits. If the decision made was erroneous, it can only be reviewed and corrected on appeal. *id.*

85. Such a rule does not preclude a party from moving to modify or vacate an order on facts occurring after it is made, or even on facts existing at the time, and discovered subsequently, when no laches can be imputed to the moving party. 668

86. Such a motion should not be granted on allegations which, if true, would reflect discreditably upon the conduct of the adverse party, his counsel and the jury, when the court is satisfied upon all the affidavits that such allegations are wholly unfounded, and that there is nothing in what has transpired warranting the belief that the plaintiff will not have an impartial hearing. *id.*

17. Interpleader.

87. The basis of an order of interpleader to be made under section 122 of the Code, is the admission and office of the stakeholder. If he denies a liability beyond that admission, and such is claimed against him, it becomes a subject of litigation, and the remedy given by this section is not applicable. *Patterson v. Perry, et al.* 686

18. Irregularity.

See ANTE, pages 683 and 687, (*Dresser v.*)

19. Orders.

88. Where the defendant, by an order in the Supreme Court, in proceedings supplementary to execution, granted by a Justice of that court, in the first judicial district, was required to appear before the said Justice, (naming him,) or one of the other Justices of the said Supreme Court, and the defendant appeared before the said Justice first named on the return day, and an order of reference was made without objection to any irregularity in the order.

Held, assuming that the clause in the order to appear before the Justice making the order, or before one of the other Justices, etc., was an irregularity, it could not affect the substantial rights of the party; that the alternative clause was mere surplusage, and especially that the party could not set up the objection by plea or demurrer in another action.

89. The supplementary proceeding under section 292, *et seq.* sections of the Code, is a proceeding in an action to enforce a judgment, it is not a special proceeding within section 8 of the Code.

90. The true sense and interpretation of the 27th section of the Code appear to be this: A proceeding commenced in the first judicial district by any Judge competent to institute it therein may be continued in such district before any other Judge competent to have commenced it.

The case of the Knickerbocker Bank, (19 Barb. 602,) is authority decisive that an order, the title of which imports that it was made at Special Term, but actually made while the Judge was engaged in a trial, during an interval or interruption of it, is authorized and regular, although the order is one properly and ordinarily made at chambers.

91. When a Judge directs process, (*viz.*, an attachment,) to issue, and has jurisdiction to so order, and when any Judge of the same court, who is found at the place designated in the attachment, on the day specified in it for appearing thereto, has jurisdiction, when the place and time to appear are distinctly pointed out in such process, the mere fact that the party is directed by it to be brought before the Judge when holding a court at Special Term, instead of before the Judge at chambers, does not render the proceeding or process void. *Dresser v. Van Pelt*, 687

20. Parties.

92. In an action brought upon an undertaking given upon a requisition in an action of claim and delivery by as-

signees of only a portion of the original promisees, there is a defect of parties; all the promisees should be represented. But the objection to such defect is taken too late, if raised for the first time upon appeal from a judgment upon a verdict for plaintiffs. *Bowdoin v. Colman*, 182

93. In an action by one of eleven harbor-masters against another of them, who was appointed by each of them to collect the fees of the eleven harbor-masters, each being entitled to one-eleventh part of all the fees which might be earned, a complaint which stated these facts, and that the defendant accepted such appointment, and agreed with the plaintiff and the others of said harbor-masters severally, and became bound to account to them severally, for such fees as he should collect, and to pay to them severally their respective shares, and which alleged that he had collected from persons named, and also from persons unknown to the plaintiff, fees for which he had not accounted, and for which he refused to account, and the amounts of which, in some instances, the plaintiff could not state, and praying judgment that defendant account to the plaintiff, in writing, for all fees collected, and that the plaintiff's share, when ascertained, be paid by the defendant, etc. *Held*, bad on demurrer, on the ground that there was a defect of parties, and that all the harbor-masters should be made parties to such an action. *Dean v. Chamberlin*, 691

21. Receiver.

See *ANTE*, page 672.

22. Reference.

94. An action cannot be referred, except by consent of parties, merely because the trial of it will require proof of various small items of damage. To justify a compulsory reference, the trial must involve "the examination of a long account on either side," according to the ordinary acceptance of the word account.

The only fact which authorizes a com-

pulsory reference is the same, under the Code, as when the Revised Statutes alone gave the power to refer. (2 R. S. 384, § 40; Code, § 271, sub. 1; 19 Wend. 31; 25 id. 687; 6 id. 503; *Van Rensselaer, and others v. Jewett*, 6 Hill, 373.) *McCullough v. Brodie*, 659

23. Service of Papers.

95. Any person sent by a defendant's attorney to serve an answer, which the plaintiff's attorney refuses to receive, for the reason stated to such messenger at the time, that the period to answer has expired, is a proper person to whom to state the reason of such refusal. Giving to him that information, and sending the answer back by him, is doing all that a plaintiff's attorney can be properly required to do in such a case.

96. If after that, it is sent to the office of the plaintiff's attorney a second time and left there, he is not bound to return it a second time, and a judgment subsequently entered, as for want of answer, will not be set aside as irregular, by reason of the answer not having been returned a second time.

97. An order opening a regular judgment and default, is not appealable in respect to the terms imposed as a condition to the granting of such relief. *Jacobs v. Marshall. The Same v. Smith*, 689

98. Where an attorney resides in one town or city, and has his office for the transaction of business in another, how shall persons in the latter place serve papers upon him if his office be closed? They are not bound to follow him to his residence and make manual delivery there. If bound to serve papers at his residence at all, in such case, service by mail is sufficient. *Lord, et al v. Vandenburg, et al*, 703

99. In such case, if, in compliance with the fifth of the rules of court, the attorney adds the place of his office to his name, he is concluded thereby. Such place will be deemed his residence for the purpose of such service, so that persons desiring to make service will not be bound to go or send to another town, though being his actual residence. *id*

100. And where the paper to be served is an answer in a cause in which the summons, (in obedience to § 128 of the Code,) specifies the place where the answer was required to be served on the plaintiff's attorney, the defendant is not bound to serve his answer in any other place. And if the attorney's office is closed, and he does not reside in that place, an endeavor to serve at the office, within the time allowed to answer, followed by an actual service within a reasonable time afterwards, when the office is open, will be regarded as a sufficient service. 708
 A party is not bound to make an impracticable service.

101. Where the plaintiff's attorney issued a summons requiring the answer to be served on him at the city of New York, and added to his subscription "195 Broadway," that being his office, and, on the last day for answering, the defendant's attorney, at about four o'clock P. M., sent the answer to his office, and found it closed, the plaintiff's attorney having left the city for his residence at Flushing; and again, the next day, the defendants' attorney sent the answer to his office, and the plaintiff's attorney refused to receive it, having in fact entered up judgment and issued execution that morning. *id.*
Held, that the defendants' attorney was regular, and the judgment, etc., irregular; and the judgment and execution was set aside, with costs. *id.*

24. *Subpœna Duces Tecum.*

102. The president or other officer of a corporation which is a party to an action, is not bound to produce on the trial the books and papers of the corporation, under a *subpœna duces tecum*, issued by the adverse party.

103. He has no such property in or control over them as gives the right, or makes it his duty to produce them.

104. Their proper place is in the office, in which the business is transacted to which they relate. The proper remedy of a party who is entitled to use their contents as evidence, is to obtain sworn copies, or an inspection and copy, under the Revised Statutes or

the Code. *La Farge v. The La Farge Fire Ins. Co.*, 680

25. *Summons.*

105. The trustees of a religious corporation, and officers appointed by them, whose elections and appointments were in conformity with the formalities prescribed by the statute, and who have, in fact, acted, and are acting as such, are at least officers *de facto*, upon whom alone a valid service by process can be made to commence an action against such corporation. *Berrian v. The Methodist Society in New York*, 682

106. When an action against such a corporation was commenced in the Superior Court by a service of summons upon persons claiming to be officers, but not in possession of the offices, and the officers *de facto*, after judgment by default, moved to vacate the judgment and set aside the proceedings, *held*,

1st. That all the proceedings must be set aside as irregular.

2d. That the title of the acting trustees could not be investigated on such a motion.

3d. That if they were claimed to be intruders, the proper proceedings to determine that question, and obtain such an adjudication, and their removal, and a new election in a lawful manner, must be taken and prosecuted elsewhere. That the Superior Court had no jurisdiction of an action or proceedings instituted to obtain such relief. *id.*

26. *Supplementary to Execution.*

107. No order will be made on the mere motion of a receiver appointed under proceedings supplementary to an execution, that he may sell the estate of the judgment-debtor, when such estate consists only of the debtor's interest as *cestui que trust* under a will by which the testator conveys his property to executors in trust, with directions to convert it into money, and divide the money into a certain number of equal shares, and invest one of said shares and apply the interest and income thereof to the judgment-debtor during his natural life, and upon his death distribute the principal with all unap-

- appropriated income to and among the said judgment-debtors then living lawful issue. *Scott v. Nevius*, 672
108. If the judgment-creditors, or such receiver as representing them, can derive any benefit from the provisions of such a will, it must be by a proceeding to which the executor is a party, and in which the benefit sought must be derived, not from a sale, but from an order in the nature of a sequestration of such portion of the annual income of the fund in question, as is not required for the suitable support and maintenance of the judgment-debtor, taking into view his condition in life, his health, and other circumstances, and the condition of his family if any he have.
109. The interest of the judgment-debtor is inalienable. If there was already an accumulation of income in the hands of the executors, (which there is not,) so much of it might, probably, be reached by an order in this proceeding, or by a proceeding under section 294 of the Code, as was not necessary for the proper support and maintenance of the judgment-debtor, taking into view the considerations above suggested.
110. But a possible or probable future surplus cannot be anticipated and reached by a proceeding instituted for that purpose, before it has accrued or come into existence.
111. But this rule does not prevent a court, on a complaint properly framed, from giving such directions as will secure to a judgment-creditor such portion of the surplus as may remain after appropriating sufficient for the proper support of the debtor, to be ascertained and fixed, upon a reference ordered for that purpose. Motion denied. *id.*
27. *Trial.*
- See ANTE, pages 494, 653, and 657.
28. *Undertaking.*
112. When the defendant, in an action to recover personal property, excepts to the sureties in the plaintiff's undertaking, if one fails to justify, and for that reason a new surety is substituted, a new undertaking must be executed. The original undertaking cannot be altered by inserting therein the name of the new surety, and by the latter signing it, without the consent of the other surety, and of those for whose benefit or protection it is required to be given. *Cobb v. Lackey*, 649
113. When the original undertaking was altered, after notice of exception to the sureties therein, on one of them failing to justify, by inserting the name of a new surety, who signed it, and made an affidavit of justification before one of defendants' attorneys, and in the presence of the attorneys of both parties, at the time and place for which notice of such justification was given, and the attorneys then separated without obtaining an approval of the sureties by a Judge of the court, and plaintiff's attorney, subsequently, obtained, *ex parte*, an approval of the undertaking, as thus altered, that approval, on motion, was set aside, as being irregular, but the plaintiff was permitted to give a new undertaking, with sureties who should justify on due notice. The fact that the substituted surety made an affidavit of justification, under the circumstances stated, before one of defendants' attorneys, was held not to be a waiver of the defendants' right to object to the insufficiency of the undertaking, or to the irregularity of the *ex parte* allowance, the sufficiency of the undertaking not having been assented to by defendants' attorneys in writing, nor proved to have been distinctly assented to orally. *id.*
- PRESUMPTION.
- See ANTE, pages 63, 182, and 583.
- PRINCIPAL AND AGENT.
- A, residing in the country, employed a stock broker, in New York, to make purchases of stock on his account; and for that purpose deposited with him \$3,600. He afterwards directed him

to take "Parker Vein stock," at a certain rate, adding, "Whatever excess it may cost, over and above my deposit in your hands, I shall very probably be glad to have you carry till sold again, if you raise no objection." The defendant purchased 200 shares of such stock, and the excess of the cost was \$349.76. The purchases were made and paid for by the 5th of September, 1853. Transfers were made to the defendant, and ultimately to his clerk, with full powers to him, so as to retain the control. No certificates were taken out at the time. *Horton v. Morgan*, 56 Between September, 1853, and June, 1854, the plaintiff had dealings in other stocks, with the defendant as his broker, and, in several letters, recognized the Parker Vein stock as in his hands, and did not demand a transfer to himself, or direct a sale, nor proffer the balance due on the purchase. The defendant had at all times, within the period mentioned, more than sufficient stock in his own name, or the name of his clerks, and under his control, to respond for the 200 shares. In June, 1854, the company having exploded, certificates were taken out, dated the 18th and 20th of May, 1854. On the 13th of June, 1854, the account current was sent, and the plaintiff paid the balance of \$349.76. On the 17th of June, in consequence of the plaintiff's request, the certificate being in the name of the clerk, with regular powers of attorney from him, were transmitted to the plaintiff, who refused to receive the same, and brought his action for the amount of \$3,600 deposited, and the balance of \$349.76 paid.

1. *Held*, that the defendant had a right to deal with this stock as he chose, he being always ready and able to transfer an equal number of shares. That he was not bound to take out certificates in his own, or the plaintiff's name, and to identify and retain them. That the transaction was a speculation, for buying and selling the stocks, and not of the nature of a regular deposit of stock, as security upon a loan, for a definite period.

2. *Seemle*, that evidence of the usage of brokers, in a case like the present, is admissible.

3. A broker who is employed to purchase stocks, and is authorized, by usage or by an express agreement, to make the purchase in his own name without disclosing the name of his principal, has no right to maintain an action against his principal for not furnishing him with money to pay for the stocks, without showing that he had demanded payment of the price and had transferred or offered to such principal the stocks he had purchased. *Merwin v. Hamilton*, 244

4. The transaction is in law precisely the same, and is governed by the same rules, that would have applied had the contract been an immediate sale from the broker as seller and his principal as buyer. The payment of the price and the transfer of the stocks are simultaneous acts and conditions mutually dependent.

5. Hence, if the broker sells the stocks without demanding payment of the price, and without transferring, or offering to transfer them, to his principal, and without notice of his intention, thereby disabling himself from making the necessary transfer or tender, he in effect converts them to his own use, and loses any right of action against his principal that he might otherwise have had. *id.*

6. *Held*, upon these grounds, that each of the first four counts in the complaint was bad upon demurrer, as not stating facts sufficient to constitute a cause of action.

The fifth count stated, as a separate cause of action, that they, the plaintiffs, reasonably deserved to have from the defendant for their commissions as stock-brokers, in making the said purchases of stock and in making other purchases and sales of stock, which they were employed by him to make, another large sum of money, etc. *id.*

7. *Held*, that these allegations, although not so definite as they ought to have been, and upon motion might have been required to be made, were sufficient upon demurrer.

Demurrer to the first four counts sustained. To the fifth overruled. *id.*

See *ANTE*, pages 169 and 358.

PRINCIPAL AND SURETY.

The question was, whether a party could hold a surety bound by an obligation he had entered into, the terms of which had been changed between the principal and creditor, without the surety's assent?

1. *Held*, that the question of benefit or prejudice arising to the surety was not the test of his responsibility. That if the terms upon which he engaged are not fully observed; if any practice or deceit has taken place which makes the contract, between the debtor and creditor different from that assented to; or if, without deceit, a material change has been made, and this is not communicated, the surety is discharged.

2. *Held*, that where a party agrees to become bound for \$1500, expected to be advanced in cash to the principal for business purposes, and but \$1000 was actually so advanced, and the chief portion of the residue was adjusted by discharging an old debt to the party making the advance, and no notice was given of this to the surety, he was exempt from liability. *McWilliams v. Mason*, 276

See ANTE, page 294.

Profits.

See ANTE, pages 315 and 363.

R.

RAILROADS.

See COMMON CARRIERS.

RATIFICATION.

1. The plaintiffs contracted to sell to one Patterson flour, and delivered to him one thousand eight hundred and ninety-seven barrels, and the defendants advanced to him, in good faith, on that and other flour, amounting in all to eight thousand one hundred and sixty-four barrels, large amounts from time

to time, and consigned the whole to their Liverpool house. The plaintiffs, claiming that they had been induced to sell to Patterson by fraud on his part, after a discovery of the alleged fraud, and with knowledge of the advances made by the defendants, and of their claims by reason thereof, and of such shipment of the flour, received an order, drawn by Patterson on the defendants, for the net proceeds of the eight thousand one hundred and sixty-four barrels of flour, less the defendants' advances and charges, delivered such order to the defendants and received their written acceptance thereof, and, when such flour had been sold, received of the defendants and receipted for the net proceeds thereof and in full of such proceeds, as per their acceptance of Patterson's said order.

Held, that these acts amounted to a ratification of the transactions between Patterson and the defendants, and that thereafter the only liability of the defendants to the plaintiffs was such as arose out of the written acceptance of Patterson's order, and the agreement contained therein.

2. The fact that the defendants had had other large transactions with Patterson prior to the one in question, was not competent testimony upon the trial of the issue, whether the defendants acted in good faith in the transactions in question. It was irrelevant, and its admission erroneous. *Wilmot v. Richardson*, 328

RE-ENTRY.

See ANTE, page 363.

RELEASE

See ANTE, pages 204 and 499.

RENT.

See LANDLORD AND TENANT.

RELIGIOUS CORPORATIONS.

See ANTE, 682, (*Berrian v.*)

S.**SET-OFF.**

See *ANTE*, pages 68, 841, 494, 532, 574.

SHIPS AND SHIPPING.

Goods were shipped aboard a vessel bound to California, and a bill of lading was executed by the master, which ultimately came into the hands of a party in San Francisco, who purchased the goods which it expressed to be shipped.

Before the vessel sailed from New York, the goods were taken by the sheriff under an attachment against the freighter, and against the protest of the master. No indemnity was given by the sheriff or his principals, though demanded. Freight, also, was required but not paid.

The purchaser in San Francisco recovered a sum of money for the omission of the master to deliver the goods according to the bill of lading. The action, which was for the recovery of the goods, was brought by the master, and the goods had been delivered to him under the Code. The only question, therefore, was, whether he was entitled to have damages for their removal?

1. *Held*, that the freighter who removes goods once shipped with a bill of lading delivered, can only reclaim them upon payment of freight, necessary expenses of unloading, and indemnifying the party for any difference between the value of the goods at the port of lading, and what the master or shipowner may be obliged to pay at the port of destination under such bill of lading.

The French and foreign authorities upon the subject were cited and commented upon. *Bartlett v. Carnley*, 194

2. *Held*, that the act of 1841 (Ch. 242) carried out the principle of general commercial law, and the bond prescribed would cover the damage and loss which the shipowner might incur. *id*

3. This action was brought by the plaintiffs to recover their commissions, as

brokers, for procuring a charter-party for a ship on a voyage from Calcutta to London. The defendants held the legal title to the ship, but held it as mortgagees, and were not in possession. The charter-party was not signed by them, and there was no proof that the person by whom it was signed, and who employed the plaintiffs, acted by their authority, or that they had ratified his acts. *Weber v. Sampson*, 358

4. *Held*, that, under these circumstances, the defendants were not liable for the commissions claimed, and that the complaint was properly dismissed. A mortgagee of a ship, if he is not in possession, although the legal title may be vested in him, and the ship be registered in his name, is not liable, as owner, for supplies furnished, or services rendered, to the ship. To render him liable an express contract is necessary. *id*

See *ANTE*, pages 48 and 191.

STOCK-BROKERS.

See *ANTE*, page 244.

STOCK-HOLDERS.

See *ANTE*, page 176.

STOPPAGE IN TRANSITU.

1. The right of a vendor to stop in transitu goods which he has sold upon credit to a vendee who becomes insolvent, can only be properly exercised while the goods are in the hands of a carrier or middleman in their transit to the vendee, and before they have come into his actual possession. The simplicity of the rule, however, as laid down in the earlier cases in England, and which, in order to defeat the vendor's right of stoppage, required an actual delivery to the vendee himself, so as to bring the goods within his corporal touch, has been broken in upon by the later decisions, which hold, that in some cases a constructive delivery, and in some an exercise by the vendee of acts of ownership, is sufficient to defeat the right of the vendor.

2. But, in the opinion of the court, a fair comparison of the cases, notwithstanding some contradictions, leads to and justifies these conclusions:—

1st. That a mere constructive delivery, though sufficient to entitle the vendor to demand the price of the goods and to place them at the risk of the vendee, does not alone defeat the right of stoppage.

2d. That while the goods are in the course of transportation to the place of destination, or are in the hands of an intermediate agent or warehouseman for the purpose of being forwarded, they are subject to the right.

3d. That they are also subject to the right after their arrival at their place of destination while in the hands of the carrier, or of a wharfinger or warehouseman, for the mere purpose of delivery to the vendee.

4th. That a delivery to the vendee's special agent, on board a conveyance owned or chartered by the vendee, if the sole purpose of such delivery is transportation to the original port of destination, does not defeat the right of the vendor.

3. But the vendor's right of stoppage is lost in the following cases:—

1st. Where the goods have come into the actual possession of the vendee.

2d. Where, after their arrival at the place of destination, the vendee exercises acts of ownership over them.

And lastly, where an agent of the vendee, having authority and power to dispose of the goods, exercises like acts of ownership.

4. *Held*, that although the doctrine for which the defendants' counsel contended, namely, that where the goods purchased, in the course of transportation are detained at an intermediate place, and without further orders cannot again be put in motion, the transitus is at an end, is favored, it is very far from being established by the recent decisions in England upon which the counsel relied.

5. *Held*, that in each of the cases so relied on, there were material circumstances by which each was discriminated from that before the court, and

which were alone sufficient to justify the actual decision.

6. *Held*, that in the case under judgment, the transitus was not ended by the temporary detention of the goods at Liverpool by the agents employed to forward them, since the agents had no power to change the ultimate port of destination as fixed by the vendor and vendee, and there was no proof that any such change was intended by any of the parties. The orders for which the forwarding agents waited, related not to the place of destination, but merely to the time and mode of transportation.

7. *Held, further*, that the transitus was not ended merely by the fact that after the arrival of the goods at New York, they were entered at the custom-house and the duties paid, before the plaintiff attempted to exercise his right of stoppage.

Nor was the transitus ended upon the ground that the goods in question had been previously assigned to the defendants for the payment of debts. An assignee, for the benefit of creditors, is not entitled to protection as a *bona fide* purchaser, but stands in the same condition as his assignor.

8. *Held*, that if there is that conflict between the decisions in England which is alleged, there are strong reasons why the court should follow in preference the more liberal doctrine of the earlier cases.

9. *Held*, that if the decisions upon which counsel for the defendants relied, are to receive the construction which he gave to them, they are directly opposed to several cases in our own courts which this court deems itself bound to follow.

10. *Held*, that the plaintiffs were entitled to judgment upon the verdict rendered by the jury in their favor. *Harris, et al v. Hart, et al*, 606

SUPERIOR COURT.

See JURISDICTION, and ANTE, page 682, (*Berrian v.*)

SUPPLEMENTAL ANSWER.

See LANDLORD AND TENANT, page 6, and
ANTE, page 661.

SUPREME COURT.

See ANTE, page 688, (*Bennett v.*)

SURETY.

See GUARANTY, and PRINCIPAL AND SURETY,
and ANTE, pages 294, 532, 588.

T.

TACKING.

See ANTE, page 208.

TAXES.

See ANTE, pages 262, 629.

TROVER.

See EVIDENCE, 6, and ANTE, page 254.

TRUSTS and TRUST ESTATES.

See ANTE, page 672.

U.

UNDERTAKINGS.

See ANTE, pages 182, 649, and 660.

USAGE.

See ANTE, page 56.

V.

VARIANCE.

1. The complaint stated that on the 15th of November, 1854, the plaintiff was the owner, as mortgagee, of certain articles of merchandise particularly described, and that these articles on the 14th of December, in the same year, were in the possession of, and in a store occupied by the mortgagor, W. B. Willis; that the sum secured to be paid by the mortgage was payable on demand, and that prior to the 14th of December its payment was demanded and refused; the plaintiff on the trial offered to prove that the possession of the merchandise was in fact changed, on the 15th of November, by its delivery to him on that day, but the court were of opinion that the variance between the proof so offered and the allegations in the complaint, was material, and, therefore, excluded the evidence.
2. *Held*, that there was a reasonable interpretation of the allegations in the complaint, by which the supposed variance would have been wholly removed, and that this interpretation ought to have been adopted on the trial; consequently that the proof offered ought not to have been excluded.
3. *Held*, that under § 169 of the Code, the alleged variance ought not to have been deemed material, since it did not appear that the defendant had been actually misled to his prejudice, in maintaining his defence, and that there was no affidavit to that effect.
4. *Held*, that upon the evidence in the case, the court had no right to consider the question, whether the mortgage to the plaintiff was fraudulent or not.
Willis v. Orser, 322

See ANTE, page 587.

VENDOR AND PURCHASER.

1. Upon a credit purchase of goods, the insolvency of the purchaser, and his

- concealment of the fact, is not of itself sufficient to ~~vante~~ the purchase for fraud.
2. The best inquiry is, did the party purchase the goods with the intention not to pay for them?
 3. If actual insolvency is proven, and a transfer of property, to pay creditors, speedily follows the transaction, evidence may be admitted of representations of solvency made upon other purchases about the same period, from other persons.
 4. And such evidence may, in that case, be given, although no representation of solvency was made in the case before the court. *Hall v. Naylor*, 71
 5. Although a contract under seal fixes the time for its performance, that time may be extended by a parol agreement. *Flynn v. McKeon*, 203
 6. Parol evidence of an agreement was introduced in the case, to prove a rescission of the sealed contract by mutual consent. When this is admissible, parol evidence to show re-instatement of the contract by like consent, is equally admissible; and the evidence was to that effect. *id.*
 7. It is the duty of a vendor to prepare and tender a deed, if he insists upon a specific performance. *id.*
 8. When the vendor and vendee have fixed upon a time and place for performance, and the vendee attends, and is prepared to do all the contract requires of him, and the vendor neglects to attend, an action will lie by the vendee to recover the deposit-money paid by him. *Flynn v. McKeon*, 203
 9. It is settled law, that when the owner of personal property makes an unconditional delivery to his vendee, with the intent to transfer the title, a subsequent *bond fide* purchaser from such vendee acquires a valid title, although the owner was induced to sell by the fraud of his vendee. *Beavers v. Lane*, 232
 10. It is also settled, that even when the owner qualifies his delivery by annexing as a condition, that immediate payment shall be made, still a *bond fide* purchaser, without notice of the condition, acquires a valid title. 232
 11. But these rules are not applicable when it appears that the contract of sale to the subsequent purchaser was so far executory, that the thing sold had not been delivered, nor any portion of the price paid, so that, in the event of a recovery by the owner, such purchaser will sustain no damage beyond the possible loss of anticipated profits. *id.*
 12. Although the contract, under such circumstances, may pass a valid title as between buyer and seller, it would not be available as a defence against the paramount title of the original owner. *id.*
 13. It may be safely laid down as law, that no person, as against the true owner, is to be deemed a *bond fide* purchaser from the first vendee, when it appears that he had neither advanced money nor property, nor incurred liabilities upon the faith of such vendee's apparent title. He is not a *bond fide* purchaser when a recovery by the owner would leave him in the same condition as if no contract of purchase had been made by him. *id.*
 14. It appearing to the court that such were the facts in relation to the purchase made by the defendants, *held*, that their situation in respect to the plaintiff, the original owner of the goods in controversy, was exactly the same as that of his vendee, and, consequently, that if the sale to him had been induced by his fraud, they had no defence to the action. *id.*
 15. *Held*, further, that upon the evidence given on the trial, and the known rules of law applicable thereto, the questions, whether the sale to the vendor of the defendants had not been obtained by fraud, and whether the delivery of the property by the plaintiff was not conditional, so that the price being unpaid, no title passed, ought to have been submitted to the jury. *id.*
Held, therefore, that the complaint ought not to have been dismissed, and that

the motion for a new trial must be granted. 232

See *ANTE*, pages 564, 606.

VERDICT.

1. Where, upon a trial, the Judge directed a verdict to be taken, subject to the opinion of the court at General Term, the judgment there to be entered, and the facts are admitted or fully proven, and nothing for the jury to pass upon, the judgment may be rendered for a dismissal of the complaint, as well as in a proper case for the plaintiff. *Chittenden v. The Empire Stone-Dressing Company*, 80

2. Such was the former practice, and the Code has not changed it. The case of *Astor v. L'Amoreux*, (4 Selden, 159,) and of *Marquart v. Marquart*, (2 Kernan, 338,) are not repugnant to it. They preclude the General Term from deducing facts from testimony, and on these deductions giving a judgment. But the principle of sending a case to the General Term, under the 265th section is to procure the judgment of law upon established facts—facts admitted or duly proved. *id.*

See *ANTE*, page 382.

W.

WAIVER.

See *ANTE*, page 587.

WARRANTY.

1. When an action is brought for the breach of an implied warranty, the existence and terms of the warranty, as material traversable facts, must be alleged in the complaint. *Prentice v. Dike*, 220
The sellers of wool knew that it was purchased by the plaintiffs for the purpose of being manufactured into hats, and that if there was any cotton in it, it would be unfit for the purpose intended, but they did not warrant

that it was fit for that purpose, but only that the flock sold contained no cotton.

Held, that the jury had no right to infer from the evidence, that the defendants meant to warrant that the wool would be fit for the purpose for which they knew it was bought, the only warranty which it was proved that they gave, being restricted in terms to the fact that there was no cotton in the wool.

2. *Held*, that the only damages which the plaintiffs were entitled to recover for the breach of this warranty, was the difference between the market value of the wool in its actual state, and what it would have been worth had it contained no cotton, with interest on that difference.

WITNESS.

1. A person, not a party to the action, and who is rendered incompetent as a witness by reason of an agreement, subsequent to the transactions in question, making him a partner of one party as of a date prior to their occurrence, may be rendered competent by an absolute assignment of all his interest in the subject matter of the action and in the business of his firm down to the time he actually became partner, on being also released by his partner from all liability to contribute by reason of the claim made in the action, and on being fully indemnified against any liability connected with said claim or action. *Wilmot v. Richardson*, 328
2. A witness, whose character has been impeached, cannot be supported by the testimony of a person who saw him for some six months twelve years prior to the trial, and who had not subsequently seen him until within six months of the trial, and had never heard him spoken of one way or the other, to the effect that he considered him a creditable witness. To receive such evidence against objection and exception is erroneous. *id.*
3. *Held*, that one of the original indorsees was properly rejected as a witness on behalf of the plaintiff, upon the ground that it was for the immediate benefit

of himself and his partners that the suit was prosecuted. *Prall v. Hinchman*, 351

4. The question, whether the suit is prosecuted for the immediate benefit of a witness offered on the part of the plaintiff, is a question of law which it belongs to the court alone to determine. *id*

5. Hence, all the evidence bearing on

the question must be addressed to the court, and when other witnesses are examined, to prove the incompetency of the witness, as having an immediate interest, he cannot be examined to contradict them by proving his own competency. He is no more competent for this purpose than to testify to the merits of the case. *id*

See PRACTICE, (*Examination of a Party.*)

J. H. W. Co

THE END.

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